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IN THE

Supreme Court of the United States

October Term, 1963
No. 919

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL FOR THE STATE OF CALIFORNIA, MALCOLM HARRIS, Director for the State of California, ARTHUR F. BROWN, District Supervisor, Southern District of the Department of Alcoholic Beverage Control, JAMES D. KELLER, District Attorney for San Diego County, California, and JAMES E. MARABLE, District Attorney for Imperial County, California,

Appellants,

vs.

AMMEX WAREHOUSE COMPANY OF SAN YSIDRO, INC. and AMMEX WAREHOUSE COMPANY, INC.,

Appellees.

JURISDICTIONAL STATEMENT.

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Appellants,

vs.

AMMEX WAREHOUSE COMPANY OF SAN YSIDRO, INC. and AMMEX WAREHOUSE COMPANY, INC.,

Appellees.

JURISDICTIONAL STATEMENT.

Opinion Below.

The opinion of the three-judge district court sought to be reviewed is reported at 224 F.Supp. 546 and is reprinted in Appendix A to this statement. The Order, Findings of Fact, Conclusions of Law, and Judgment entered December 23, 1963 by the District Court are reprinted in Appendix B of this statement.

Jurisdiction.

This proceeding was brought by appellees in the United States District Court for the Southern District of California, Southern Division, pursuant to 28 U.S.C. Sections 2281 and 2284 for injunctive relief and an adjudication that the Constitution and the laws of the United States preclude the application of the California Alcoholic Beverage Control Act to appellees' operations. The three-judge district court by judgment dated and entered on December 23, 1963, permanently enjoined appellants from interfering with, controlling, or regulating the business of appellees in the State of California, and further permanently enjoining appellants from enforcing or attempting to enforce the California Alcoholic Beverage Control Act against persons supplying liquor in bond to appellees or storing or supplying such liquor on behalf of appellees.

A notice of appeal to this Court was filed in the United States District Court for the Southern District of California, Southern Division, on January 15, 1964. Jurisdiction of this Court to review on direct appeal the judgment of the three-judge district court is conferred by U.S.C. Section 1253.

Questions Presented.

1. Whether the District Court had jurisdiction in this cause under Title 28 U.S.C. Section 1331.

2. Whether the District Court had jurisdiction in this cause under Title 28 U.S.C. Section 1337.

3. Whether the Alcoholic Beverage Control Act of the State of California is in conflict with the United States Tariff Act of 1930 and the regulations promulgated thereunder.

4. Whether the operations of appellees are subject to the liquor control laws of the State of California by virtue of the Twenty-first Amendment to the Constitution of the United States, the Webb-Kenyon Act of the United States (27 U.S.C. §122) and the Wilson Act of the United States (27 U.S.C. §121).

Constitutional and Statutory Provisions Involved.

United States Constitution, Article I, Section 8:

> "The Congress shall have power, . . . 3. To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

United States Constitution, Article I, Section 10, clause 2:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection laws: . . ."

United States Constitution, Article VI, clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Amendment XXI, Section 2:

> "The transportation or importation into any State, Territory, or possession of the United

States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Wilson Act (27 U.S.C. §121):

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Webb-Kenyon Act (27 U.S.C. §122):

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package

or otherwise, in violation of any law of such State Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Section 311 of the United States Tariff Act of 1930, as amended (19 U.S.C. §1311), set forth in Appendix C, *infra*.

California Alcoholic Beverage Control Act, Business and Professions Code Sections 23017, 23018, 23025, 23040, 23041, 23109, 23300, 23301, 23374, 23374.5, 23376, 23378, 23387, 23661, 2663, 23775, set forth in Appendix C, *infra*.

Statement of the Case.

Appellees are two corporations incorporated under the laws of the State of California. Appellees propose to engage in the business of importing intoxicating liquors into California and, at their business locations, appellees propose to hold for sale and sell such liquors to California residents and other persons traveling from California by foot or private vehicle into the Republic of Mexico.

Appellees propose to engage in such business at a location in San Ysidro, California and at a location in Calexico, California. Each of these locations is within the State of California, approximately one (1) mile from the international border between California and Mexico. At each of such locations appellees have leased privately owned commercial property and propose to establish their business operations thereon. Each location is subject to the laws of the State of California and is afforded police protection in the same manner as other

privately owned businesses in California. Neither of appellees' business locations is upon Federally-owned property or property over which the United States government exercises jurisdiction. Appellees are not engated in a warehouse business.

Appellees have established a portion of each of their aforesaid business premises as a storage area for the intoxicating liquors which appellees sell. Appellees have obtained from the United States Bureau of Customs customs permits and bonds to enable appellees to comply with customs laws pertaining to the receipt, storage and export of intoxicating liquors.

A portion of each of appellees' business locations consists of a room which contains a display area and counter, in which appellees will have one or more employees on duty. This room, which is not bonded or otherwise under the supervision of the United States Customs, is used by appellees for displaying the brands of liquors sold by appellees, and for taking orders and receiving money from customers who purchase such liquors. Most sales by appellees would be in quantitites of one to three bottles to individual customers who come to these premises for such purpose.

Appellees propose to sell intoxicating liquors at the above locations in the following manner: the customer enters the display room and selects the brand and quantity of liquor he desires; the customer then pays the appellees' employee the price of the liquor (which price is free of Federal and state taxes and below the California legal minimum price); the customer is then given a receipt and told that the liquor will be delivered to the customer at a designated point in the sixty-foot strip area at the international border between California and

Mexico. Appellees, under the supervision of an employee of the United States Customs Bureau, then remove the liquor from the customs bonded area on their premises and send it in one of their customs bonded trucks to the designated point near the border. There, the customer gives appellees' employee the receipt and the liquor is delivered into the physical possession of the customer. The customer then walks toward the border and across into Mexico under the observation of United States Customs officials.

Appellees have not obtained from the State of California any type of alcoholic beverage license or permit to engage in their proposed business operations nor do appellees intend to obtain such a license or permit when they do commence business. Although appellees, prior to this litigation, did file with the California Department of Alcoholic Beverage Control an application for a "customs broker" license, appellees withdrew this application before an administrative hearing had been completed.

On August 8, 1962, appellees instituted this action[1] in the United States District Court for the Southern District of California, Southern Division, seeking declaratory and injunctive relief against appellants. The complaint alleges that appellees' proposed business operations are specifically authorized by The Tariff Act of 1930, as amended (19 U.S.C. §308, *et seq.*) and the provisions of 26 U.S.C. §5232, *et seq.*, and that the California Alcoholic Beverage Control Act is repugnant to the aforesaid statutes and repugnant to Article

[1]Appellees had not previously instituted any action in relation to this matter in any of the state courts of California or in any other Federal court.

I, Section 8, clause 3, and Article I, Section 10, clause 2, of the United States Constitution.

A three-judge court was impaneled under 28 U.S.C. §§ 2281, 2284, to hear and determine the controversy.

After trial of the matter, during which appellants moved that the proceedings be dismissed for want of jurisdiction, the three-judge court entered its opinion granting appellees the injunctive relief prayed for. Thereafter, on December 23, 1963, the Court entered its Order, Findings of Fact, Conclusions of Law and Judgment.

On January 15, 1964, appellants filed their Notice of Appeal to this Court. On January 17, 1964, the District Court, on petition of appellants, entered its order granting a stay of the judgment pending final determination of this appeal.

The Questions Presented Are Substantial.

A. Jurisdiction Was Not Established Under Title 28 U.S.C. Section 1331.

Appellees asserted that jurisdiction existed in the District Court under 28 U.S.C. Section 1331. (Complaint, p. 2, par. 3a.) Appellants in the District Court moved that the proceedings be dismissed by reason of appellees' having failed to establish the requisite jurisdictional amount under 28 U.S.C. Section 1331. [Rep. Tr. pp. 6, 164.] Appellants based their motion chiefly upon the holding of *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135. That case holds that the value of a right interfered with by regulation is measured by the value of the business unregulated less the value of the business regulated. The difference in these values must

equal $10,000 or more. In the case at bar, the District Court, relying upon *Gibbs v. Buck*, 307 U.S. 66, 59 S. Ct. 725, 83 L.Ed. 1111, found that jurisdiction did exist under 28 U.S.C. Section 1331 (234 F.Supp. 546, 550; Conclusion of Law 1). Appellants respectfully urge that *Gibbs v. Buck* is not controlling here. That case involved a Florida statute which absolutely prohibited certain combinations among copyright owners of musical compositions and which declared such organizations to be unlawful monopolies. The case at bar is materially different. Here, appellees are not prohibited from engaging in their business in California provided appellees obtain an appropriate liquor license or permit from the state liquor control authority. There is no evidence that appellees have been prohibited from applying for and obtaining the appropriate license or permit from the California liquor authority. The only attempt to obtain such a license from the California Department of Alcoholic Beverage Control was an application filed by appellees for a "customs broker's" license, which application appellees withdrew before any final determination could be made. There is no evidence, and appellees offered no evidence, to establish that the nature of their business unregulated less the value of their business regulated by the California liquor laws equals $10,000 or more. Therefore, *McNutt v. General Motors Acceptance Corporation, supra*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135, clearly is applicable and appellees have not established the requisite jurisdictional amount under 28 U.S.C. Section 1331.[2]

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[2]In this connection, it is pertinent to note that the annual fees for some of the various California liquor licenses, any one of which appears applicable to appellees' business, are set forth in Section 23320 of the California Business and Professions Code

B. Jurisdiction Was Not Established Under 28 U.S.C. Section 1337.

In their complaint filed in the District Court, appellees also alleged that jurisdiction existed under 28 U.S.C. Section 1337. (Complaint, p. 2, par. 3b.) Essentially, such allegation was that the application and enforcement of the California Alcoholic Beverage Control Act against appellees prohibited a business specifically authorized by acts of the Congress of the United States, namely, The Tariff Act of 1930, as amended (19 U.S.C. § 308, et seq.), and the provisions of 26 U.S.C. Section 5232, et seq. Appellants moved to dismiss the action upon the ground that jurisdiction had not been established under the aforesaid statutes. [Rep. Tr. pp. 6, 164.] The District Court, without citation of any decisional authority, held that jurisdiction did exist under 28 U.S.C. Section 1337 in that the "controversy concerns the laws relating to interstate and foreign commerce (224 F.Supp. 546, 551)."

The District Court erred in ruling in favor of jurisdiction. The test of jurisdiction must be determined from the allegations of the complaint. *Shelby County, Tennessee v. Fairway Homes, Inc.*, 285 F.2d 617, 619 (6 Circ. 1961). Viewed in their most favorable light, the allegations of the complaint frame essentially one issue, namely, that a state regulatory statute is invalid because it allegedly conflicts with the acts of Congress enacted under Article I, Section 8, clause 3 (commerce clause) and Article I, Section 10, clause 2 (import-

as follows: "distilled spirits importer's general license"—$276.00 "distilled spirits importer's license"—no fee; "distilled spirits wholesaler's license"—$276.00. If any additional cost would be incurred in appellees' compliance with the California liquor laws, such costs have not been demonstrated by appellees.

export clause) of the United States Constitution. These allegations are not sufficient to establish that this is a proceeding *"arising under"* any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. *Schatte v. International Alliance, etc.*, 70 F.Supp. 1008, 1011 (S.D. California, 1947), affirmed 165 F.2d 216, certiorari denied, 68 S.Ct. 1018, 334 U.S. 812, 92 L.Ed. 1743; *Delaware L. & W. R. Co. v. Slocum*, 56 F. Supp. 634, 636 (W.D. New York, 1944); see also *South Carolina State Ports Authority v. Seaboard Air Line Railroad Company*, 124 F.Supp. 533, 536, 537 (E.D. South Carolina, 1954).

Jurisdiction is not established under 28 U.S.C. Section 1337 merely because the validity of a statute is questioned upon the basis that it conflicts with a Federal law. The complaint must allege a controversy or dispute involving the validity or construction of a Federal law. *Shelby County, Tennessee v. Fairway Homes, Inc., supra*, 285 F. 2d 617, 619 (6 Circ. 1961); *Wilkins v. Parker*, 35 F.Supp. 1004, 1005 (S.D. California, 1940). The validity or construction of an act of Congress is not called into question in the complaint here. Therefore, no jurisdiction has been established under 28 U.S.C Section 1337.

C. The Opinion of the District Court Nullifies Previous Decisions of the United States Supreme Court Interpreting the Twenty-First Amendment of the Federal Constitution.

The decision of the District Court, by its interpretation and application of the Twenty-first Amendment, the commerce clause, the supremacy clause, and the import-export clause of the United States Constitution, has placed in jeopardy the California statutes regulating

the importation and sale of intoxicating liquors in the State of California. If permitted to stand, the decision of the District Court will permit appellees, under the guise of engaging in foreign commerce, to operate in California an essentially intrastate business of selling intoxicating liquors. The decision of the District Court permits appellees to engage in such business free from any existing California statute or regulation enacted to protect the people of California from unlawful sales and diversion of intoxicating liquors within the California borders. While the legal issues in this appeal are similar to those in *Idlewild Bon-Voyage Liquor Corporation v. Epstein*, 212 F.Supp. 376 (probable jurisdiction noted by this Court on October 14, 1963, 373 U.S. 809, 84 S.Ct. 43, 11 L.Ed.2d 46), there are factual differences which appellants believe demonstrate to an even greater degree the impact and invalidity of the ruling of the court below.

1. The business operations of appellees in the State of California, as outlined in the Statement of the Case, *supra*, and as further described hereinafter, fall squarely within the express provisions of section 2 of the Twenty-first Amendment to the Federal Constitution. The following facts are not disputed: (1) that appellees are *importing* intoxicating liquors into the State of California; (2) that appellees *take delivery* of such intoxicating liquors at their places of business in California; (3) that appellees store intoxicating liquors in the State of California and for purposes of sale remove individual bottles from the original case packages; (4) that in the State of California appellees negotiate the sale and consummate the sale of such intoxicating liquors to individual purchasers; (5) that appellees cause

such alcoholic beverages to be delivered in the State of California to the purchasers who are journeying from California into the Republic of Mexico; and (6) that appellees, by having failed to obtain the necessary California liquor license authorizing them to engage in such activities, are in violation of the liquor regulatory laws of the State of California.

The regulatory prerogatives granted the states under section 2 of the Twenty-first Amendment in regard to intoxicating liquors is not limited by the commerce clause of the United States Constitution (Art. I, §8, cl. 3). *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62, 57 S.Ct. 77, 91 L.Ed. 38 (1936); *Ziffren, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 84 L.Ed. 128 (1939); *Washington Brewers Institute v. United States*, 137 F.2d 964, 966-967 (9 Circ. 1943), cert. denied 320 U.S. 776, 64 S.Ct. 89, 88 L.Ed. 465 (1943); *Wylie v. State Board of Equalization*, 21 F. Supp. 604, 605-606 (S.D. California, 1937).

Even if it be assumed, for purposes of argument, that the commerce clause of the United States Constitution is paramount to the Twenty-first Amendment on the issues in this appeal, it does not follow that the decision of the District Court is correct. A contrary conclusion is compelled by a consideration of the Wilson Act (26 Stat. 313 [1890], 27 U.S.C. §121) and the Webb-Kenyon Act (37 Stat. 699 [1913], re-enacted by Act of Congress of August 27, 1935, 49 Stat. 877, 27 U.S.C. §122). The former provides that all intoxicating liquors transported into a state or remaining therein "for *use, consumption, sale* or *storage* therein" shall be subject to the laws of such state to the same

extent as though such liquors had been produced in such state. (Emphasis added.) The latter statute (Webb-Kenyon Act) prohibits shipment or transportation of intoxicating liquors into any state "to be received, possessed, sold or in any manner used" in violation of the laws thereof. The District Court in this case failed to give any consideration whatever to the foregoing statutes.

The decision of the District Court principally is based upon the holdings in *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 414, 60 S.Ct 664, 84 L.Ed. 840 (1940); *National Distillers Products Corporation v. City and County of San Francisco*, 141 Cal.App.2d 651, 297 P. 2d 61 (1956); *Collins v. Yosemite Park & Curry Company*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938); and *Johnson v. Yellow Cab Transit Company*, 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814 (1944). As stated below, none of the foregoing cases are decisive or controlling upon the issues here.

The *McGoldrick* case, *supra*, 309 U.S. 414, involved a state *tax* upon oil which had been *imported* into the United States for purposes of *export*. The tax was held to be invalid because it impaired the competitive advantage of the importer in foreign trade. In the case at bar, there is *no state tax* attempted to be levied against appellees on the intoxicating liquors which they purchase and sell. Moreover, appellees are not competing in foreign markets; hence, appellees' activities do not fall within any of the protective legislation of Congress designed to give our producers a competitive advantage in such foreign marketing areas. Appellees are in fact competing, not in any foreign market, but in the State of California with local liquor businesses

which are licensed by California. Very little, if any, of appellees' liquors will ever reach a market in Mexico or other foreign country. Appellees sell liquor *in California* to persons *in California*. Such purchasers undoubtedly would have purchased such liquors from California licensees except for the fact that appellees have the advantage of selling at prices free of any Federal tax.

The *National Distillers* case, *supra*, 141 Cal.App.2d 651, likewise is not controlling here since that case involved a *local personal property tax* sought to be imposed by a municipality upon in bond liquors destined for foreign markets. The *Collins* case, *supra*, 304 U.S. 518, is not applicable since that case involved an attempt by California to apply its liquor license laws to a business in a limited territorial area over which the Federal government maintained exclusive jurisdiction. In the case at bar, all of appellees' activities occur in areas over which the State of California exercises either exclusive or concurrent jurisdiction.

Nor is *Johnson v. Yellow Cab Transit Company*, *supra*, 321 U.S. 383, controlling. That case involved a state statute which, except for very limited purposes, absolutely prohibited the importation of intoxicating liquors. In the case at bar, the California statute permits importation of intoxicating liquors by all persons duly licensed to do so. Moreover, the State of California *allows without any requirement of licensure* appellees to import and export intoxicating liquors so long as such liquors are in common carriers in continuous transit. (Alcoholic Beverage Control Act, §23109.) Appellees have declined to avail themselves of these statutes.

2. In order to grant appellees the injunctive relief sought, the District Court found itself in the position of having to reach the conclusion that California seeks to prohibit—not regulate—appellees' business. In reaching such a conclusion, the District Court committed clear and substantial error. There is no evidence that appellees have been prevented from obtaining the appropriate California license for their business activities. Appellants have solicited appellees to file an application for the appropriate license. [Rep. Tr. p. 269.] Appellees' only action to secure a license was an application for a customs broker's license, which application appellees withdrew before the California liquor authorities could make a final determination thereon.

Appellants seek only to regulate appellees' business to prevent unlawful diversion and to prevent violations of the state liquor laws. Without licensure of appellees, California has no legal mechanism whereby such regulations may be inforced since *appellees have stated that they will not permit California to make reasonable inspections of appellees' business operations.* [Rep. Tr. pp. 75-76.]

California does have a comprehensive system of laws for licensure of persons importing and otherwise dealing in intoxicating liquors within the state. For example, sections 23374 and 23375 of the California Alcoholic Beverage Control Act provide for an importer's license which authorizes the holder to import alcoholic beverages from without the state and export alcoholic beverages from the state. The holder of such an importer's license is required to hold a license for resale (i.e. off-sale general license [§ 23394] or a wholesaler's license [§ 23379]). *Wylie v. State Board of Equaliza-*

tion, 21 F. Supp. 604, 605, 606 (1937) unequivocally upheld the constitutionality of sections 23374 and 23375.

California has given express recognition and exemption to interstate and foreign shipments of intoxicating liquors in transit through the state. As noted earlier, section 23109 of the Alcoholic Beverage Control Act clearly excepts from provisions of the Act those shipments in possession or custody of common carriers in continuous transit through California. The scope of such exemption is more than sufficient in breadth to permit appellees to engage in a *bona fide export* business. But appellees do not avail themselves of such exemption and the reason is that appellees are interrupting such shipments for the purpose of making sales, not in foreign commerce, but to residents of California. The mere fact that delivery to appellees' customers is not made until the customers are ready to cross the international boundary does not change the intrastate nature of appellees' business.

The District Court holds, in effect, that California may regulate appellees but, in order to do so, California must enact new legislation tailored to fit appellees' plan of business. The impact of the ruling is far-reaching indeed. If this ruling is allowed to stand, every person seeking to evade the licensing requirements of the California liquor laws may do so by formulating a novel plan of business which does not fit within the state's comprehensive licensing statutes. Obviously, the state is not required to set up special statutes to cover each plan of business devised by persons seeking to deal in intoxicating liquors.

Conclusion.

Appellants respectfully submit that the decision of the District Court raises a question of significant and substantial importance. That question is whether an effective system of control of intoxicating liquors by the states under the Twenty-first Amendment of the Federal Constitution may be nullified by persons engaged in essentially an intrastate activity under an asserted protection of the Federal Tariff Act. The decision below not only permits appellees to evade the California liquor regulations but appellees also evade the payment of Federal liquor taxes on what constitutes an annual multimillion dollar business in domestic liquor sales.

It is submitted that the Court has jurisdiction in this cause and that this appeal should be heard.

Dated: Los Angeles, California, March 13, 1964.

Respectfully submitted,

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APPENDIX A.

Ammex Warehouse Company of San Ysidro, Inc., and Ammex Warehouse Company, Inc., Plaintiffs, v. Department of Alcoholic Beverage Control For the State of California, Malcolm Harris, Director for the State of California, Arthur F. Brown, District Supervisor, Southern District of the Department of Alcoholic Beverage Control, James D. Keller, District Attorney for San Diego County, California, and James E. Marable, District Attorney for Imperial County, California, Defendants. No. 2752.

United States District Court S.D. California, S. D. Nov. 27, 1963.

Before Jertberg, Circuit Judge, and Yankwich and James M. Carter, District Judges.

James M. Carter, District Judge.

This case involves the question as to whether the State of California, through its Department of Alcoholic Beverage Control may prevent the plaintiffs under the guise of regulation, from carrying on a proposed business which plaintiffs claim is protected by the Commerce and the Export-Import Clauses of the United States constitution.

PLAINTIFFS' PROPOSED OPERATIONS

The plaintiffs are two California corporations which have worked out a method of doing business, consisting of handling of liquor "in bond" and exporting it to Mexico. They have leased premises in San Ysidro at the border near San Diego and in Calexico, at the border in Imperial County. They have made improvements on the property and obtained the various permits from

the federal government; have purchased trucks and are ready to commence business. They have filed bonds with the appropriate United States agencies in the principal amount of $15,000 for each plaintiff.

Plaintiffs' warehouses are located approximately one mile from the international border between California and Mexico. Each bonded warehouse consists of a bonded storage area and adjoining such bonded warehouse is a display room open to the public, used to display empty bottles of the brands stored in the bonded warehouse. Customers will not be permitted to enter the bonded warehouse area, but may enter the display room, pay for liquor and receive a receipt for the purchase. No liquor is delivered until it is exported

All liquor handled by plaintiffs will be "in bond" for exportation out of the state of California. It will be imported into the state of California for exportation only. The liquor will be "in bond" continually until the delivery to the customer as described hereafter.

The liquor will leave bonded warehouses of manufacturers or distributors pursuant to "withdrawal entry" as provided by the Customs Service, and will be shipped to the plaintiffs at the two ports, but will be consigned in care of the Collector of Customs at the two ports. The carrier will unload the liquor from its bonded truck into its bonded warehouse, which is under government seal, and notify the Customs of the arrival of such shipment. The liquor will then be transported in bond to the bonded warehouses of plaintiffs.

By arrangements worked out with the United States Collector of Customs at San Diego, the United States Bureau of Customs will keep a U.S. Customs officer stationed at plaintiffs' respective warehouses six days

a week. These officers will be employees of Customs and paid by the U. S. However, under federal law, reimbursement will be made monthly to the United States by the plaintiffs for their salaries. These Customs officers will stay within plaintiffs' bonded warehouse while the door thereto is unlocked. When not on duty, the warehouse is padlocked with two locks, one of Customs and one of plaintiffs'. A Customs officer will be present to permit withdrawal in bond from the warehouse and will keep a running inventory of the liquor stored at all times.

The procedure of exportation is accomplished in part by employees of the plaintiffs, each employee being bonded by the United States for the cartment of the liquor. They will personally transport the liquor delivered to them by the Customs officers at the plaintiffs' warehouses to the U. S. Customs Export official station at the international boundary between the state of California and the Republic of Mexico. This Customs Export officer will supervise the exportation of the liquor into Mexico and in turn certify that such liquor has been exported from the United States into Mexico.

At the boundary between California and Mexico there is a 60 foot wide strip declared by the President to be a public reservation as a protection against smuggling. All liquors sold by plaintiffs will be delivered to the office of the U. S. Bureau of Customs located within such strip and the export officer stationed there will see to it that the liquor is exported and will so certify. The state of California and the United States have concurrent jurisdiction over the 60 foot strip.

In order to withdraw liquor from the warehouse of the plaintiffs' for export, five copies of appropriate

documents which have been approved by U. S. Customs will be filed by plaintiffs' employees with the Customs officer stationed at the warehouse. Thus Customs officer then removes the liquor from the warehouse and places it in a sealed container with two copies of the documents stapled thereto. Each bottle of liquor will bear a sticker, "For export use and consumption outside the Continental Limits of the United States."

Plaintiffs' bonded cartment employees will then take the liquor and documents via the bonded truck owned by plaintiffs to the Export Office of the U. S. Customs located at the border and within the 60 foot strip. The liquor is then delivered to the customer as he departs from the 60 foot strip into Mexico and the U. S. Export Officer certifies that the liquor has been exported.

The actual sales procedure is as follows:

The customer goes to the public display and pays for the liquor he desires to have exported to Mexico. He is told to meet the bonded employee of the plaintiffs at the U. S. Customs office in the 60 foot strip, and a time for the meeting is arranged. The withdrawal papers are prepared and one copy goes to the customer.

In exporting goods other than liquor from the United States to Mexico, they often arrive in truck loads and the truck is parked for convenience somewhere within the 60 foot strip. When the papers have been checked and cleared, the truck is then permitted to cross the border and the Customs Export Officer certifies that the exportation has been accomplished. In the case of the liquor involved in the present operation, it is handed to the customer moments before he departs across the border. We do not think it signifi .nt as to whether

this distance from the border is 50 feet or 5 inches. A Customs House could be constructed so that a doorway entered at the border and the customer could be handed the liquor as he goes through the doorway. We think it no different that a customer is handed the liquor some measurable feet and some moments in time before he crosses the border so long as his exit across the border and the exportation of the liquor is supervised and certified to by the U. S. Customs Export Officer.

The above procedures for exporting liquor have been approved by the U. S. Bureau of Customs in Washington and is currently followed at various border crossing points in the states of Texas and Arizona.

Thus, the liquor is continually in bond until the delivery to the customer at the border.

We find that the customer receives *custody* of the liquor moments before crossing the border, but that the *possession* of the liquor in a legal sense is in the U. S. Customs Export Officer until the moment the liquor crosses the international boundary. The legal possession is in the Export Officer, since he has allowed the custody of the liquor to the customer for the sole purpose of crossing the border. If he does not cross the border, the custody may be taken from the customer.

Under these facts, we conclude that there is no complete and full delivery to the customer until the moment that he crosses the border; up to that moment he merely has physical custody of the liquor under the control and possession of the U. S. Customs Export Officer.

JURTICIABLE CONTROVERSY

The law requires that there be more than a supposititious or fictitious case to constitute a justiciable controversy. Here, however, plaintiffs have entered written leases for the conduct of their business, and have expended substantial sums of money. They have worked out completely with the U. S. Customs, the method of procedure for handling their "in bond" business. They are now ready to proceed except for the threats of the State to exercise civil and criminal sanctions if plaintiffs proceed.

The complaint alleges that if plaintiffs proceed with their "in bond" business as outlined in their complaint, that the Department of Alcoholic Beverage Control will proceed with the application of criminal and civil sanctions and will make seizures of liquors and vehicles.

These allegations are admitted by the answer and the admissions summarized in the pretrial order. At argument the State's attorneys conceded that in their opinion a justiciable controversy existed.

We think plaintiffs have shown enough to bring the matter properly before a court. Plaintiffs need not proceed further and encounter seizures and civil and criminal sanctions before seeking relief in court. We hold that a justiciable controversy exists.

JURISDICTION

Plaintiffs rest jurisdiction upon 28 U.S.C.A. §1331, a matter in controversy exceeding $10,000, and arising under the Constitution or laws of the United States; and upon 28 U.S.C.A. § 1337, an action arising under any act of Congress regulating commerce.

Jurisdictional Amount

The complaint contains a formal allegation that the amount in controversy exceeds $10,000, exclusive of costs and interest. Such a formal allegation is sufficient, unless the complaint contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint, in which case the suit should be dismissed. KVOS, Inc., v. Associated Press, (1936) 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183.

The defendant in its brief argues that as the jurisdictional facts have been challenged the formal allegation is no longer sufficient, and since the complaint does not plead in particularity the facts supporting the allegation, the action must be dismissed. This is not the law.

True, the plaintiffs must now bear the burden of proof of showing with particularity the presence of the required amount, but this showing need not be made by the complaint alone. Nothing in the complaint detracts from or qualifies the jurisdictional claim so as to show that jurisdiction is lacking, and the plaintiffs are free to prove their claim by the production of evidence. This they have done.

In an effort to keep out the evidence of value adduced by the plaintiff, the defendant moved to strike the testimony of the witness Ward, relying on McNutt v. General Motors Acceptance Corp., (1936) 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135. That case lays down the rule that the value of a right interfered with by regulation is measured by the value of the business

unregulated less the value of the business regulated. The difference in these values must equal $10,000 or more.

However, the McNutt rule was amplified in Gibbs v. Buck, (1939) 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111, wherein the Supreme Court held that the jurisdictional amount is measured by the value of the right to conduct business free of the *prohibition* of a statute. It found that the trial court had properly admitted into evidence facts concerning the number of contacts the plaintiff had entered into, the amounts which had been collected under those contracts, and the amounts expected in the future. On the basis of such facts, the court determined jurisdiction to be present.

The facts in this case are similar to those in Gibbs v. Buck, supra, as the effect of California's liquor laws is to prohibit the plaintiffs from engaging in business. The value of the prescribed right in this case is measured by the value of plaintiffs' business, since this is the amount they will lose if defendant is successful.

The plaintiffs' witness Ward testified that a willing purchaser would pay $80,000 and $20,000 respectively, for the two businesses. These valuations were supported by the testimony that there is now a contract under which a third party has agreed to pay $50,000 for one half of Ward's stock in the two corporations, when they commence operations. The testimony respecting the expected profits to be made, based on similar operations elsewhere on the United States-Mexico border, was uncontradicted.

A finding of amount in controversy can be based upon future or contingent damages, so long as there is a probability, not a possibility of future harm. Food

Fair Stores v. Food Fair, (1 Cir. 1949) 177 F.2d 177; Friedman v. International Assoc. of Machinists, (1955) 95 U.S.App. 128, 220 F.2d 808.

The plaintiff having demonstrated both present and future value of their invaded rights to do business to be in excess of $10,000, the monetary jurisdictional requirement is satisfied.

(a) 28 U.S.C. § 1331

A substantial federal question exists. This was inferentially held in Idlewild Bon Voyage Liquor Corp. v. Epstein, (1962) 370 U.S. 713, 82 S.Ct. 1294, 8 L. Ed. 2d 794 and in the decision of the 3-judge court when the case was returned for hearing, Idlewild Bon Vogage Liquor Corp. v. Epstein, (D.C., 1962) 212 F.Supp. 376. A late case involving a somewhat related problem is American Travelers Club Inc., v. Hostetter, S.D.N.Y. (1963) 219 F.Supp. 95. There the court also found a substantial federal question and jurisdiction. (219 F.Supp. p. 101).

(b) 28 U.S.C.A. § 1337.

This section requires no jurisdictional amount. We think as hereafter shown that the controversy concerns the laws relating to interstate and foreign commerce. We hold we have jurisdiction under 28 U.S.C.A. § 1337.

THE STATE LICENSING PROVISIONS

Plaintiffs' proposed business involves both importation and exporation. Of the licenses discussed below only an Importer's License and a Custom Broker's License authorizes both importation and exporation.

None of the state's licensing provisions fit the proposed operation of the plaintiffs. References below are to sections of the Alcoholic Beverage Control Act of California contained in the Business and Professional Code.

Under Sec. 23355 only the rights and privileges specified in a license *"and no others"* may be exercised.

Defendants contend plaintiffs could secure an off-sale license. Section 23394 provides for an off-sale general license. Neither importation or exportation is authorized.

Section 23402 provides a Retailer may purchase for resale only from a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's or wholesaler's license.

Section 23109 provides liquor in continual transit through the state is exempt but only while in the possession or custody of common carrier. This section is not broad enough to cover an "in bond" situation where the liquor may be stored in a government bonded warehouse.

Manufacturer's Agents License

Sec. 23366 limits the "sale or delivery of distilled spirits only to holders of distilled spirits manufactuter's, rectifier's, or distilled spirits wholesaler's licenses."

It authorizes the exportation of distilled spirits. But obviously plaintiffs are not manufacturer's agents. Moreover the license does not authorize *importing*, a part of plaintiff's business.

Defendants at argument and in their briefs claimed plaintiffs should secure an Importer's, a Wholesaler's or

a Custom Broker's license. None of these will permit plaintiffs to operate their proposed business.

(a) *Importer's License*

Section 23374 authorizes the holder of an importer's license to export.

Section 23775 requires the licensed importer to *also* hold a license authorizing *sale for resale*. The licenses which authorize sale for resale are:—

Sec. 23356 Manufacturer's License
Sec. 23368 Rectifier's License
Sec. 23779 Wholesaler's License

Of these only the Wholesaler's license remotely concerns plaintiffs' proposed activities. Sec. 23779 of the Act, requires such licensee to carry on a bona fide wholesale business by sale to *retail licensees*.

(b) *Wholesaler's License*

Section 23378 authorizes a wholesaler to export but limits sales to persons holding licenses for *sale* of alcoholic beverages.

Section 23387 authorizes a wholesaler to sell to persons who take delivery within the state for delivery or use without the state within 90 days from the date of the sale.

But Section 23779 (referred to above under Importers) requires the licensee to carry on a bona fide wholesale business by sale to *retail licensees*. This plaintiffs do not propose to do and thus, although a wholesaler may export, plaintiffs could not obtain or hold a wholesaler's license.

(c) *Custom Broker's License*

Section 23376 authorizes such a license. The licensee "may transfer to licensed importers' liquor brought into the state in bond. It also authorizes export. But Section 23019 requires the licensee to act for others and not for himself.

Moreover, in an application for the license the A.B.C. ruled that plaintiffs operations would not constitute them bona fide customs brokers.

The question was asked of counsel for the state on argument—"Suppose there is no one of these licenses that covers the particular type of business. Then what is the position of the state of California? They can't do business?" MR. DEERING (for the defendants) "That is right. The state of California cannot, and in my judgment does not have to set up laws which will cover every conceivable situation that a plaintiff can think of." (Tr. 251). The net result is that no licensing provisions of the present state act cover plaintiffs' operations. Defendants would therefore bar plaintiffs from this business by enforcing the various sanctions of the State act.

THE APPLICATION OF THE DOCTRINE OF ABSTENTION

As in the 3-judge case of Idlewild Bon-Voyage Liquor Corp., v. Epstein, (S.D. N.Y. 1962) 212 F.Supp. 376, there is, to say the least, great doubt as to whether the Alcoholic Beverage Control Act of California is applicable to plaintiffs' proposed operations. (212 F. Supp. p. 379). It is likewise probable that the California State Legislature in adopting the statute did not contemplate such a business as plaintiffs propose to operate. (212 F. Supp. p. 379).

Likewise it seems reasonably certain the California courts would reject as unlawful defendants' attempts to prevent plaintiffs' business. (212 F.Supp. p. 379).

Finally, National Distillers Products Corp. v. City and County of San Francisco, (1956) 141 Cal.App.2d 651, 297 P.2d 61, cert. den. 352 U.S. 928, 77 S.Ct. 227, 1 L.Ed. 2d 163 which in turn relied heavily and almost entirely on McGoldrick v. Gulf Oil Corp., (1940) 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840, demonstrates what California courts would do with the problem. McGoldrick involved a tax on oil and National Distillers a tax on liquor. In our case the State claims to be attempting *regulation*, not the imposition of a tax. In each case above the tax was held invalid as an infringement of the Congressional regulation of commerce. The oil and the liquor were in the stream of interstate commerce; therefore the State could not tax. Likewise, the State by purported regulation may not prohibit a business whose activities are protected under the Commerce clause.

We agree with Idlewild that the doctrine of abstention should not apply and that we should decide the constitutional problem here presented. (212 F. Supp. pp. 380-381).

THE COMMERCE CLAUSE AND THE EXPORT AND IMPORT CLAUSE

Article I, Section 8, Clause 3 of the United States Constitution provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States and with Indian Tribes."

Article I, Section 10, Clause 2 provides "No State shall, without the Consent of the Congress, lay any Im-

ports or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws * * *."

Pursuant to the Commerce Clause the Congress enacted Section 311 of the Tariff Act of 1930 [19 U.S.C.A. § 1311] providing for bonded manufacturing warehouses and particularly providing that no Internal Revenue tax shall be imposed on distilled spirits and wine rectified in warehouses, provided that such distilled spirits and wine are exported or shipped in accordance with the section.

The present Chapter 51 of the Internal Revenue Code of 1954 enacted September 2, 1958, 72 Stat. 1313 contains sections (now in 26 U.S.C.A.) which deal with bonded liquors. These are sections 5212, Transfer of Distilled spirits from bonded premises free of tax or without payment of tax; 5221, Commencement, suspension and resumption of operations; 5222, Production, receipts, removal and use of distilling materials; 5223, Redistillation of spirits.

Regulations of the U. S. Treasury Department, Bureau of Customs, have been promulgated under the Tariff Act. They appear in 19 C.F.R. parts 8, 12, 18, 19, 21, 23 and 25.

The power of Congress over exports and imports is supreme. Generally States may not interfere with this function while the goods are in the course of foreign commerce. Texas & New Orleans Railroad Company v. Sabine Tram Company, (1913) 227 U.S. 111, 33 S.Ct. 229, 57 L.Ed. 442.

We next turn to the effect of the 21st Amendment which in Sec. 2 clearly states, "The transportation or

importation into any State * * * of the United States *for delivery or use therein* of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." (Emphasis added).

The cases involving the interaction and interpretation of the Commerce clause and the 21st Amendment have defined three areas concerning state power;—

(1) Importation for "Delivery or use" within the State.

(2) Shipments through or across States into areas of federal jurisdiction lying within a state.

(3) Shipments of liquor crossing a State destined for another State or a foreign country.

We summarize the cases:

(1) *Importation for "Delivery or Use" within the State.*

Here the State, because of the 21st Amendment could levy a license fee or tax. State Board of Equalization of Calif. v. Young's Market Company, (1936), 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38, or forbid the importation Joseph S. Finch & Co. v. McKittrick, (1939) 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246.

But these powers to be exercised by States under the 21st Amendment did not preempt the field or prevent Federal government from entering the field.

In United States v. Frankfort Distilleries, (1945) 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951, the court held that notwithstanding the powers given States under the 21st Amendment, such powers did not overrule the federal Anti-Trust statutes.

Thus, although States could regulate, license, or tax, or prohibit entirely the *delivery or use of liquor within its boundary*, the Commerce clause and statute affecting interstate or foreign commerce were unaffected.

(2) *Shipments of liquor through or across States into areas of federal jurisdiction lying wholly within a state.*

In Collins v. Yosemite Park & Curry Company, (1938) 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502, California was held without power to license or regulate liquor shipments into Yosemite, a federal Park, lying wholly within California. In Johnson v. Yellow Cab Transit Company, (1944) 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814 the court held that the state seizure of liquor being shipped across Oklahoma, a dry state, into Fort Sill, a federal reservation within Oklahoma, was an unlawful interference with interstate commerce.

(3) *Shipments of liquor crossing a State destined for another State or foreign country.*

Ziffrin Inc., v. Reeves, (1939) 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128, was one of the later cases which raised the question of how far a State could go in regulating interstate shipments. There appears strong language indicating the court would permit a state to have free rein in its regulation of this type of interstate commerce, but the court pointed out that the conditions imposed by Kentucky "are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well-known evils and secure payment of revenue."

In Duckworth v. Arkansas, (1941) 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294, where Arkansas required a

carrier of liquor to secure a State permit, the court held that the 21st Amendment did not govern, since there was no sale or use within the state. The court held the requiring of a permit was within the reasonable police power of the state's regulatory authority. The court said:

> "The Arkansas statute does not conflict with any act of Congress. *It does not forbid or preclude the transportation*, or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state. It does not violate the commerce clause. Cf. Ziffrin, Inc. v. Reeves, 308 U.S. 132 [60 S.Ct. 163, 84 L.Ed. 128]." (Emphasis added)

In Carter v. Commonwealth of Virginia, (1944) 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605, it was argued that the 21st Amendment gave Virginia no power to prohibit absolutely a shipment from Maryland across Virginia into North Carolina, and that Virginia's power to regulate was limited by the Commerce Clause to reasonable regulation.

> "Whatever may be the effect of the Twenty-first Amendment, this record presents no problem that may not be resolved under the Commerce Clause alone. That Clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution pro tanto of absolute state sovereignty over the same subject matter. The Twenty-first Amendment limits that grant of power as to intoxicating liquor by prohibiting 'transportation or importation into any State,

Territory, or possession of the United States *for delivery or use therein* * * * in violation of the laws thereof.' By interpretation of this Court the amendment has been held to relieve the states of the limitations of the Commerce Clause on their powers over such transportation or importation. It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the Amendment. Collins v. Yosemite Park Co., 304 U.S. 518, 535, 538 [58 S.Ct. 1009, 1017, 1018, 82 L.Ed. 1502]." (Emphasis added).

In Gordon v. Texas, (1958) 355 U.S. 369, 78 S.Ct. 363, 2 L.Ed.2d 352, the defendant enroute to his home in No. Carolina from Mexico, entered Texas with two gallons of Mexican rum. Defendant's conviction for possession of illicit liquor without payment of the Texas tax was affirmed by the Supreme Court in a per curiam decision citing the 21st Amendment and Carter v. Commonwealth of Virginia, supra.

These cases illustrate that California could legally *regulate* plaintiffs' proposed operations to the extent that no undue burden was placed on interstate or foreign commerce but not prohibit them. The State has impliedly admitted that if the Alcoholic Beverage Control Act of California is applied, it will prohibit plaintiffs' operations.

Goods in Bond are protected by the Commerce Clause

McGoldrick v. Gulf Oil Corp., supra, (309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840) teaches the goods "in bond" do not become a part of the common mass of property in a State. It involved the importation of

crude oil "in bond," and with arrival of it for export or lawful purpose free of the import duty which would otherwise be payable. The Comptroller of New York sought to tax the sale of fuel oil thus manufactured. The court said:

> "For present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation." (citing cases).
>
> "From the time of importation until the moment when the bunker 'C' oil is laden on vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, is segregated from the common mass of goods and property within the state, and is subject to the supervision and control of federal customs officers."
>
> "* * * It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. See, People [of State of New York] v. Compagnie Generale Transatlantique, 107 U.S. 59, 63 [2 S.Ct. 87, 90, 27 L.Ed. 383]. The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass

of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the Congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce."

National Distillers Products Corp. v. City and County of San Francisco, (supra) (141 Cal.App.2d 651, 297 P.2d 61) was a case involving liquor in foreign commerce and the attempt of the State of California to tax it. The court relied almost wholly upon McGoldrick, supra, and struck down the tax.

In our case the goods are "in bond" or under control of U.S. Customs until the movement of export. They never become part of the common mass of goods in the State.

THE IDLEWILD BON VOYAGE CASE

Idlewild Bon Voyage Liquor Corporation v. Epstein, (S.D.N.Y.1962) 212 F. Supp. 376, a decision by a statutory 3-judge court deciding a like problem, is dispositive of our case.

Under the name of Idlewild Bon-Voyage Liquor Corporation v. Rohan, et al., (S.D.N.Y.1960) 188 F.Supp. 434, the district court relying upon the doctrine of abstention, refused to convene a 3-judge court. The case was appealed and under the same name in 289 F.2d 426, (1961) the court of appeals of the Second Circuit held that the single judge district court had no jurisdiction to refuse the request for a 3-judge court

under the facts, but that the court of appeals lacked jurisdiction to determine the matter on appeal.

The case went to the Supreme Court on grant of certiorari 368 U.S. 812, 82 S.Ct. 88, 7 L.Ed.2d 21 and in Idlewild Bon Voyage Liquor Corporation v. Epstein, (1962) 370 U.S. 713, 82 S.Ct 1294, 8 L.Ed.2d 794, the court held that a 3-judge court should have been convened by the single district judge court, but that the court of appeals was not powerless and that in substance, its judgment was reversed and the case remanded to the district court for action consistent with the views expressed.

The 3-judge court was assembled and in Idlewild Bon-Voyage Liquor Corporation v. Epstein et al., (S.D.N.Y.1962) 212 F.Supp. 376, the court ruled that the plaintiff was entitled to relief in its application for injunction against the members of the Liquor Authority of the State of New York. Notice of appeal was filed March 13, 1963, and the record certified to the Supreme Court on May 6, 1963.

The appeal is pending. On October 14th, the Supreme court under No. 116 of the current calendar noted jurisdiction under the name Hostetter v. Idlewild Bon-Voyage Liquor Corp., 375 U.S. ..... 84 S.Ct. 43. According to Law Week [32 L.W. 3126] the questions presented are:

1. Does the Commerce Clause prevent New York from terminating the business of any licensable dealer who sells liquor for export to departing passengers at N. Y. International Airport?

2. Does the Twenty-first Amendment subject such dealers' operations to N. Y. Liquor control laws?

Factually the case varies only in one respect from the case before us. In our case the liquor is handed

to the purchaser by a Customs Agent at the time he crosses the border into Mexico. We have *found* that although the purchaser has physical custody of the liquor for the few moments until he crosses the border, and the liquor is at all times under the supervision of the Customs Agent.

And we have *concluded* that the purchaser has only the physical custody of the liquor and that the legal possession of the liquor remains in the Customs agent until the moment the purchaser crosses the border.

In the case before the 3-judge court [212 F.Supp. 376] "The [liquor] is delivered aboard the departing aircraft on documents approved by United States Customs, with instructions to the air line to deliver to the passenger purchaser only upon arrival at the foreign destination."

We hold that the factual distinction between the two cases is a distinction without a difference.

In the Idlewild case, the passenger receives the liquor upon arrival at the foreign destination. In our case, he receives it the moment before he crosses the border under the supervision of a Customs agent who supervises his departure and the exportation of the liquor from the United States into Mexico, and certifies to its exportation.

The recent 3-judge case of American Travelers Club Inc., v. Hostetter, (S.D.N.Y. 6/24/63) 219 F.Supp. 95, does not require a different result. There the situation was reversed, in that liquor was being brought into the United States. Customers purchased liquor abroad and declared it upon arrival from foreign service as duty free "liquor to follow." The problem did not involve liquors which the tourist carried with him on return from abroad. The court denied injunctive relief on

the ground that "[T]he very heart of plaintiffs' liquor operation falls within the coverage of the New York statute and that it is subject to requirements of regulation and licensing." (219 F.Supp. p. 105).

The court finds no provisions in the Customs statute "purporting to create an affirmative federal 'right' to import into a state a quantity of liquor in violation of a state's liquor laws." (219 F.Supp. p. 106).

The court distinguishes the case from Idlewild Bon-Voyage Liquor Corp. v. Epstein, supra, (212 F.Supp. 376) on the ground that in such case there was no delivery or use until arrival at the foreign destination, and because the Twenty-first Amendment did not apply "because there was no 'delivery or use' within New York, and close Customs inspection reduced to 'minimal' proportions the possibility of diversion within the State. The State action was struck down as a violation of the Commerce Clause because New York had not sought to 'regulate or supervise,' but to 'terminate,' and this attempted prohibition was not found to be 'reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state.' "

The case is helpful however, in that the court holds that there was jurisdiction of a substantial federal question under 28 U.S.C. 1331 and that the "extent of the injury to plaintiffs' business satisfies the amount in controversy requirement of 28 U.S.C. § 1331." (ft. note 6).

The court also found that the 3-judge court was proper under 28 U.S.C. §§ 2281 and 2284. (219 F.Supp. p. 102).

CONCLUSION

We read the cases as holding that a State may reasonably *regulate* interstate or foreign shipments of liquor for good cause, and that where such regulations are reasonable the burden placed on interstate commerce will not require the State regulation to be struck down. Conversely however, a State may not *prohibit* such interstate or foreign shipments.

"The action threatened againt plaintiff is his elimination from the business in which he engages." Idlewild Bon-Voyage Liquor Corp. v. Epstein, supra, 212 F.Supp. 376 at 383 * * * The case before us does not, therefore involve reasonable measures aimed at preventing unlawful diversion or use of alcoholic beverages within [California]. The Liquor Authority does not seek to use the lower of [California] to regulate or supervise. It seeks to terminate. This it cannot constitutionally do. (Paraphrasing Idlewild Bon-Voyage Liquor Corp. v. Epstein, supra, 212 F.Supp. 376 at 386).

We would prefer to await the decision in the Idlewild case in the Supreme Court but the case must be decided.

Accordingly the plaintiffs shall have injunctive relief against the defendants as prayed.

The proposed judgment or decree submitted by the defendants will be modified to provide that the injunction is limited to activities of the State in enforcing the Alcoholic Beverage Control statutes as they now exist. If the State of California sees fit to pass statutes and regulations directed towards reasonable regulation of plaintiffs' business, this will be another case for another day.

APPENDIX B.

In the District Court of the United States, Southern District of California, Southern Division.

Ammex Warehouse Company of San Ysidro, Inc. and Ammex Warehouse Company, Inc., Plaintiffs vs. Department of Alcoholic Beverage Control for the State of California, Malcolm Harris, Director of Alcoholic Beverage Control for the State of California, Arthur F. Brown, District Supervisor, Southern District of the Department of Alcoholic Beverage Control, James D. Keller, District Attorney for San Diego County, California, and James E. Marable, District Attorney for Imperial County, California, Defendants. Civil Action No. 2752-SD-C.

ORDER.

The above entitled and numbered cause having come on regularly for trial, and the Court, consisting of three judges, having been convened pursuant to Title 28, U. S. C. § 2281 et seq., having duly considered the evidence and being fully advised in the premises, now finds the following:

FINDINGS OF FACT

1. Plaintiffs are duly formed and existing California corporations empowered under their articles of incorporation to do all things involved in this action, both having been organized by Raymond N. Amendt, Frances L. Amendt and Hal G. Ward.

2. Plaintiff Ammex Warehouse Company of San Ysidro, Inc. as its place of business and maintains leased premises in the City of San Ysidro, County of San Diego, State of California, and Plaintiff Ammex

Warehouse Company, Inc. has its place of business and maintains leased premises in the City of Calexico, County of Imperial, State of California.

3. Defendant Malcolm E. Harris is the Director of the State Department of Alcoholic Beverage Control, located at Sacramento, California; Defendant Arthur F. Brown is the District Supervisor for the Department of Alcoholic Beverage Control and is charged with enforcement of the Act in San Ysidro and Calexico and resides in San Diego County; Defendant James E. Keller, the District Attorney of San Diego County, who resides therein, and the District Attorney of Imperial County (formerly James E. Marable) are both charged with enforcement of the Act in their counties. All are proper parties to this suit.

4. Plaintiffs each desire to carry on the business of exporting liquor which has had no state or federal tax paid thereon from the State of California into the Republic of Mexico (the details of which export business are more fully described herein) and in order to carry out said export business, have gone to considerable expense in that both Plaintiffs have leased premises in the State of California, made certain improvements necessary for their businesses, and obtained various permits from the Federal Government, all of which will be more fully described herein. Each of the Plaintiff corporations has entered into three-year lease agreements, leasing warehouse and office facilities in the respective ports where they intend to do business. Thousands of dollars have been expended renovating the leased premises and preparing the warehouse areas to meet Bureau of Customs requirements for bonded warehouses. Trucks have been purchased and basically

the businesses are ready to commence. In connection with the designation and bonding of the premises as bonded warehouses, Plaintiffs have filed bonds with the appropriate United States Agencies in the principal amount of $15,000.00 for each Plaintiff.

5. Both Plaintiffs, in order to carry on the business of exporting liquor into the Republic of Mexico, have obtained the following permits from the United States:

AMMEX WAREHOUSE COMPANY OF SAN YSIDRO, INC.:

a. Permit—Under Chapter 52, Internal Revenue Code, Form 2096, to engage in business as an export warehouse proprietor, dated May 10, 1962.

b. Importer's Basic Permit, Form 1631, dated May 10, 1962.

c. Treasury Department Bureau of Customs letter dated June 7, 1962, from Earl D. Roberts, Collector of Customs.

AMMEX WAREHOUSE COMPANY, INC.:

a. Permit—Under Chapter 52, Internal Revenue Code, Form 2096, to engage in business as an export warehouse proprietor, dated May 10, 1962.

b. Importer's Basic Permit—Form 1631, dated May 10, 1962.

c. Treasury Department Bureau of Customs letter dated June 7, 1962, from Earl D. Roberts Collector of Customs.

6. At both the San Ysidro and Calexico ports of entry into the United States, there are facilities for ve-

hicular and pedestrian travel. Thousands of people, by vehicle and on foot, cross the border between these two countries daily and hence the United States has elaborate customs and immigration facilities set up at the crossing points to handle such international trade and travel. Thousands of United States citizens actually travel as tourists into the Republic of Mexico by passing through such ports and they are vital to the economy of the Republic of Mexico which reciprocates by allowing its citizens to tour our country and engage in commerce with United States business concerns such as Plaintiffs. Plaintiffs' warehouses are located approximately one (1) mile from the international boundary line between California and the Republic of Mexico, and within the territorial and jurisdictional boundaries of the State of California.

7. Both bonded warehouses from which Plaintiffs propose to operate consist of a bonded storage area (which has been duly designated and bonded as a U. S. Customs Class 2 and 8 Bonded Warehouse), and adjoining said bonded warehouse is a display room which is located in the front portion of the building. In this front display room is a counter, behind which are shelves which will be used for displaying the brands, both imported and domestic bourbon and scotch liquors, which will be sold by the Plaintiffs. The bottles displayed are empty, there being no liquor anywhere on the premises except that stored in the bonded warehouse. The display room is designed to permit individuals, including United States citizens and Mexican Nationals, to enter the premises, order, and pay for, in cash, any quantity of liquor which they desire to have exported into the Republic of Mexico. Customers will not be

permitted to enter the bonded warehouse area. Plaintiffs' employees will accept the customer's money and give him a receipt for his purchase, but no liquor is delivered until it is exported.

8. Neither of the Plaintiffs have commenced operation of the business on which several thousand dollars have been spent in readiness to do business because the Defendants have threatened prosecution and confiscation of Plaintiffs' liquor for violation of the California Alcoholic Beverage Control Act, it being Defendants' position that such Act applies to Plaintiffs' proposed operations and a license or permit is required. While Defendants' counsel, upon the trial, would not admit that there is no license or permit provided in the Act which would permit Plaintiffs' operation, neither would counsel state what license or permit could be used. It is clear from all of the evidence that Defendants apply the California Alcoholic Beverage Control Act to Plaintiffs and Plaintiffs cannot commence operation without being prosecuted for violating such Act.

9. Upon commencing operation, the Plaintiffs' respective businesses will be conducted in substantially the following manner:

a. All liquor handled by Plaintiffs will be "in bond" for exportation out of the State of California. It will be imported into the State of California for exportation only. Plaintiffs will acquire and take title to all liquor to be exported from importers, manufacturers or distributors who have liquor stored in warehouses for exportation from the United States.

b. Such liquor will be ordered from an importer, manufacturer or distributor who has the required stock

stored in a Class 2, Class 6 or Class 8 bonded warehouse. The firm from which the liquor is ordered fills the order for Plaintiffs by filing with the Collector of Customs in the district where it is located, properly completed, a form bearing Government No. 7512, entitled "Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit". This is what is commonly known in the Customs Service as a form of "withdrawal entry". When such entry has been filed with the Collector of Customs, if he approves same, the original will be given to the firm making the entry to be used by it as a permit for the withdrawal. Since the liquor will be for shipment, it will then be removed from the warehouse and loaded, under the supervision of a United States Customs officer, on board a bonded public carrier which is then given the original as its manifest to be delivered to the export officer of the United States Bureau of Customs upon arrival of the shipment at either San Ysidro or Calexico, California.

c. The liquor so removed will be consigned to Plaintiffs but in care of the Collector of Customs at these two ports.

d. Upon arrival at its destination, the carrier will unload the liquor from its bonded truck into its bonded warehouse which is under government seal, and then will deliver its original manifest to the export officer at the port. This is notice to the Collector of Customs at such port of the arrival of such shipment.

e. Plaintiffs will then file a withdrawal for rewarehousing entry with the Collector of Customs at such port which is Customs Form 7502 entitled "Ware-

house or Rewarehouse Entry". This the Bureau of Customs will check against the Form 7512 filed in the District where the original withdrawal was made, the Collector of Customs in such district having mailed to the Collector of Customs at the California destination a "control" and "mail" copy of Form 7512. If everything checks out, then on Customs Form 7502A entitled "Warehouse or Rewarehouse Permit", the Collector of Customs at the California Port will give to Plaintiffs a permit to be used to obtain storage of the entire shipment in its warehouse.

f. Plaintiffs will take such permit (Form 7502A) to the carrier who then will load the shipment out of its warehouse and transport it in its bonded truck to the warehouse of Plaintiffs. There the warehouse officer of the United States Customs Service (stationed at Plaintiffs' bonded warehouse, as more fully explained later), will inspect the shipment and supervise its unloading and storage into the Plaintiffs' bonded warehouse. Once there, it is under government padlock and will only be removed for exportation in accordance with the procedure established and as set forth herein. At none of the times mentioned in preceding paragraphs "a" through this paragraph can the Plaintiffs obtain possession of the liquor because same is in the custody of U. S. Customs until it is exported.

g. Through special agreement with the U. S. Collector of Customs at San Diego, California, the United States Bureau of Customs will keep a United States Customs officer stationed at the Plaintiffs' respective warehouses six days a week, at all times while the Plaintiffs are open for business. These officers will be employees of the United States Bureau of Customs.

responsible to the United States Bureau of Customs, and will be employed under the United States Civil Service laws and paid by the United States. However, the salaries (including any overtime) paid such officers, under law, will be reimbursed monthly to the United States by the Plaintiffs. These officers of the United States Bureau of Customs stay within the bonded warehouse while the door thereto is unlocked. When they are not on duty, the door into the warehouse is securely padlocked with two locks, a United States Customs lock and a lock of the Plaintiffs. The door will not be opened unless the Custom officer is present to open the Customs lock and then the officer is present at all times while it is open. The Custom's officer will not permit persons to enter the bonded warehouse except properly bonded employees of the Plaintiffs and only then while the Customs officer is present and supervising the entry. The Custom officer will be present to permit withdrawal in bond from the warehouse, and such officer will keep a running inventory of the liquor stored so that at any time, the inventory of liquor stored can be checked against United States Customs records to determine that no liquor has been removed from the warehouse except that which has been permitted by the Customs officer to be removed in bond for export from the United States.

h. No liquor will be removed from such bonded warehouse except upon order and with the permission of the Customs officer stationed there and he will not give such order or permission unless and until a proper withdrawal entry is made for withdrawal in bond for export out of the United States. The procedure of exportation in bond is accomplished in part by each em-

ployee of the Plaintiffs who handles the liquor, such employee being bonded by the United States, for the cartment of the liquor. They are so bonded to insure that they will personally transport the liquor delivered to them by the Customs officer at the warehouse to the United States Customs Export officer stationed at the International Boundary between the State of California and the Republic of Mexico, which officer can supervise such exportation and then in turn certify that such liquor is exported from the United States into the Republic of Mexico. The United States Customs Service stations an officer at such International Boundary for the purpose of being able to certify to the Bureau of Customs that all merchandise which is exported under any laws with which the United States Bureau of Customs is concerned, has, in fact, been exported.

i. At the international Boundary between the State of California and the Republic of Mexico, there is a sixty-foot-wide strip declared by the President of the United States to be a public reservation as a protection against the smuggling of goods between the United States and said Republic. All liquor sold by the Plaintiffs will be delivered to the office of the United States Bureau of Customs which is located within such strip and the export officer stationed there will satisfy himself that such liquor is actually taken into the Republic of Mexico and, on that basis, will certify to the Bureau of Customs that such liquor has been exported. The State of California and the United States Government have concurrent jurisdiction over the area wherein liquor sold by Plaintiffs for exportation is delivered to the purchaser.

j. In order to withdraw liquor from the warehouse for export, five copies of appropriate documents which have been approved by U. S. Customs will be filed by the employees of Plaintiffs with the Customs officer stationed at the warehouse, which Customs officer then removes the liquor from the storeroom and places it in a sealed container with two copies of the documents stapled thereto. Each bottle of liquor will bear a sticker stating "for export use and consumption outside the Continental Limits of the United States." Plaintiffs' bonded cartment employees will than take such liquor and the documents via a bonded truck owned by Plaintiffs to the Export Office of the United States Bureau of Customs located within the federal reservation at the International Boundary between California and Mexico, and, upon order of the Export Officer and under such officer's supervision and control, the liquor will be delivered to the Plaintiffs' customers for transportation by such customer into the Republic of Mexico as such customer is in the process of departing from the sixty-foot-wide strip across the international boundary into Mexico. The United States Export Officer then certifies that such liquor has been exported.

k. The actual sales will be made as follows: The customer enters Plaintiffs' place of business in Calexico or San Ysidro. In the front storeroom, from in front of the counter, the customer orders and pays for the liquor which the customer desires to take into Mexico. The customer pays Plaintiffs for the liquor ordered and is told to meet a bonded employee of the Plaintiffs at the United States Customs office located at the International Boundary between the United States and Mexico. A time for the meeting is arranged. Plain-

tiffs' employees fill out the necessary withdrawal papers and supply one copy to the customer. The remaining four copies are delivered to the Customs Officer in charge of the warehouse, and from that point, the procedure is as previously set out.

10. The United States Bureau of Customs at Washington, D. C. has approved the procedure outlined by Plaintiffs for conducting their business of exporting liquor into the Republic of Mexico and such procedure is currently being followed at various border-crossing points in the States of Texas and Arizona.

11. From the time liquor is purchased by Plaintiffs until the time that such liquor actually crosses the boundary between the State of California and the Republic of Mexico, such liquor remains under the control of the U. S. Bureau of Customs. In this connection, the Court finds that notwithstanding the fact that the liquor is actually delivered to a purchaser before such purchaser actually crosses the boundary between the State of California and the Republic of Mexico, it is done upon the direction of U. S. Customs and the U. S. Bureau of Customs is in control of such liquor until it has crossed the Border. The means of exportation by Plaintiffs is fixed and determined by Customs and, in effect, the liquor is delivered by Plaintiffs to Customs at the crossing and Customs sees to the accomplishment of the exportation.

12. The United States Bureau of Customs enforces the Alcoholic Beverage Control Act of the State of California by reason of which purchasers of liquor from Plaintiffs cannot return to the State of California with their purchase of liquor after entering the Republic of

Mexico without being subject to confiscation of the liquor since California does not permit the importation of liquor by its citizens and such laws are enforced by the United States Bureau of Customs at the Border.

13. The United States Bureau of Customs will not permit Plaintiffs to withdraw liquor from their bonded warehouse for any purpose other than for exportation unless Plaintiffs have obtained from the State of California an appropriate license which would authorize them to dispose of the liquor in a manner other than for exportation.

14. Under Plaintiffs' proposed method of operation, as above described, this Court finds that Plaintiffs will not bring liquor into the State of California or acquire liquor in the State of California for delivery or use within the State of California because of the fact that all of the liquor which Plaintiffs will handle is in a continuous stream of foreign commerce and under the complete control and custody of the United States Bureau of Customs until such liquor is exported from the United States. In this connection, the Court further finds that although actual delivery of the liquor takes place within the State of California a few feet from the international boundary line between the State of California and the Republic of Mexico, that such a delivery occurs at the same time that the United States Bureau of Customs certifies and considers the liquor to be exported. Such a method of exportation is no different than the methods employed by the United States Bureau of Customs for the exportation of any other merchandise other than liquor and such other merchandise is considered exported by the United States Bureau of Customs when the certificate of exportation is signed

by the Customs officer, even though the merchandise is still physically situated within the United States and the State of California.

15. The value of each Plaintiff's right to do business in the State of California under the proposed method of operation as described in Paragraph 9 above exceeds the sum of $10,000.00 for each plaintiff.

CONCLUSIONS OF LAW

1. This suit involves a substantial federal question and the amount in controversy is in excess of $10,000.00 for each Plaintiff. Furthermore, this is a proceeding arising under the Tariff Act of 1930, by reason of all of which, this Court has jurisdiction of the case under Title 28, U.S. Code, § 1331 and 1337.

2. This is a suit to enjoin the enforcement of a state statute on the grounds that it is unconstitutional by reason of which a three-judge court was properly convened pursuant to Title 28, U. S. Code, § 2281 et seq.

3. Plaintiffs have a right under Rule 20(a) of the Federal Rules of Civil Procedure to join severally in this suit because there exist common questions of law and fact.

4. The operation of Plaintiffs' proposed export business is authorized by the laws enacted by Congress of the United States and the powers granted it by the Constitution of the United States over Interstate and Foreign Commerce, namely Article I, Sec. 8, Clause 3 (Commerce Clause), Article I, Section 10, Clause 2 (Export-Import Clause), and Article VI, Clause 2 (Supremacy Clause). Such laws and statutes include the following:

a. The Tariff Act of 1930, as amended, particularly Sections 308, 311, 553, 554, 555, 556, 557, 558, 564, 565, 585, 586, 592, 594, 595, et seq., and 646 (being 19 U.S.C., Sections 1308, 1311, 1553, 1554, 1555, 1556, 1557, 1558, 1564, 1565, 1585, 1586, 1592, 1594, 1595, 1623 and 1646, respectively);

b. 26 U. S. C., Sections 5232, 5242, 5243 and 5247;

c. Customs Regulations contained in 19 C.F.R., Parts 4, 8, 12 (§ 12.37), 18, 19 (see in particular 18.1, 18.2, 18.3, 18.5, 18.10, 18.16-1824), Part 19 (see particularly Sections 19.1-19.15), Part 21, Part 23 and Part 25.

5. The basic plan of these laws and regulations is that under certain circumstances, certain merchandise (including liquor) on which custom's duties are due (if imported) or Internal Revenue taxes are due (if manufactured in the United States), may be imported for exportation or manufactured for exportation in foreign commerce without payment of such taxes or duties if handled in bond. The statutes were expressly enacted by the Congress of the United States as an aid to foreign commerce so that United States citizens could compete in the markets of the world without the burden of taxes and duties that otherwise would substantially reduce such commerce.

6. The regulations establish the constant and complete control by the U. S. Customs Service from the time of importation or manufacture to the time of exportation of all liquor which will be sold in foreign commerce by Plaintiffs.

7. There is no license or combination of licenses which exist under the provisions of the Alcoholic Bever-

age Control Act of California which will allow Plaintiffs to conduct their export business as they are authorized to do, under federal law, by reason of which Plaintiffs cannot conduct their export business without subjecting themselves to civil and criminal prosecution by the State of California. The Alcoholic Beverage Control Act of California, therefore, prohibits Plaintiffs from conducting their proposed business of exporting liquor by reason of which the Alcoholic Beverage Control Act of California, as applied by Defendants to Plaintiffs and their operation, is repugnant to the Export-Import Clause, the Commerce Clause and the Supremacy Clause of the United States Constitution, and as so applied, the Alcoholic Beverage Control Act of California is unconstitutional. This conclusion relates only to its application to Plaintiffs and does not in anywise invalidate such Act as it may apply or be applied to parties or situations other than Plaintiffs and their proposed operations.

9. Plaintiffs' proposed business, which involves the exportation of liquor into the Republic of Mexico, is authorized and protected by the Constitution of the United States, the various laws enacted by Congress pursuant thereto, and the regulations promulgated pursuant to said statutes (all as stated above) and as such, this right may not be prohibited to any extent by state action, and since Plaintiffs are not attempting to engage in a business which will cause liquor to be delivered or used within the State of California within the meaning of the 21st Amendment to the U. S. Constitution, Defendants cannot constitutionally prohibit Plaintiffs from carrying on their proposed business.

10. Plaintiffs have no adequate remedy at law other than injunction to protect their rights to conduct their

proposed business, by reason of which a permanent injunction against Defendants is the proper remedy for Plaintiffs' protection.

JUDGMENT

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed:

1. The Defendants, Department of Alcoholic Beverage Control for the State of California, Malcolm Harris, Director of Alcoholic Beverage Control for the State of California, Arthur F. Brown, District Supervisor, Southern District of the Department of Alcoholic Beverage Control, James D. Keller, District Attorney for San Diego County, California, and James E. Marable, District Attorney for Imperial County, California, jointly and severally, and their agents, employees, representatives, officers and attorneys, and their successors in office (each of whom or which are jointly and severally referred to as Defendants), be, and they are hereby, enjoined from prohibiting in any manner, either directly or indirectly, by interfering with, controlling or regulating, Plaintiffs, Ammex Warehouse Company of San Ysidro, Inc. and Ammex Warehouse Company, Inc., in the operation of their said businesses anywhere within the State of California as that business is described in the findings of fact which are filed herein. The permanent injunction here granted applies notwithstanding the fact that Plaintiffs, their agents, officers or employees, may effect delivery of liquor within the boundaries of the State of California, so long as such delivery is effected under and pursuant to authority and supervision of the U. S. Bureau of Customs and/or the U. S. Internal Revenue Service while in bond

under said laws of the United States for the purpose of exporting such liquor from the United States, but it does not extend to any withdrawal by Plaintiffs of any liquor from bond within the State of California if such liquor is not to be exported and Federal, State and U. S. Customs taxes or duties are paid thereon. The permanent injunction here granted extends to and enjoins the said Defendants and their successors in office from, in any manner, attempting to enforce said Alcoholic Beverage Control Act of California against any and all persons, firms or corporations, who, or which, supply liquor in bond to Plaintiffs or who transport it in bond to Plaintiffs' warehouses, or who store it in bond (the bonds referred to being bonds to the United States and its agencies, pursuant to procedure set forth in said laws of the United States, as referred to herein), and in anywise from indirectly doing what they and each of them are directly enjoined from doing herein. This injunction is granted for the reasons stated in the foregoing findings of fact and conclusions of law and this judgment.

2. Costs of suit are adjudged against the Defendants.

Signed For Entry this ..... day of ....., 1963, by each of the undersigned Judges, who, together, compose the three-judge court duly constituted to decide this cause.

.....
Judge

.....
Judge

.....
Judge

APPENDIX C.

Section 311 of the United States Tariff Act of 1930, as amended (19 U.S.C. §1311), provides as follows:

All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided*, That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *Provided further*, That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days after June 17, 1930, shall be withdrawn from such warehouse for exportation without payment of a duty on

such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, That the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, ch. 65, 18 Stat. 24, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which

would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages con-

taining such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of section 3433 of the Revised Statutes shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this chapter and to the merchandise conveyed therein.

Distilled spirits and wines which are recitifed in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided*, That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further*, That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier. June 17, 1930, c. 497, Title III, § 311, 46 Stat. 691; June 26, 1936, c. 830, Title IV, § 404, 49 Stat. 1960.

23017. "Importer." "Importer" means:

(a) Any consignee of alcoholic beverages brought into the State from without this State, when the alcoholic beverages are for delivery or use within this State.

(b) Any person, except a public warehouse licensed under this division, to whom delivery is first made in this State of alcoholic beverages brought into this State from without this State for delivery or use within this State.

(c) Any person, licensed as an importer, selling alcoholic beverages to nonlicensees within an area over which the United States Government exercises jurisdiction, when delivery of the alcoholic beverages is made to the nonlicensees by a common carrier transporting the alcoholic beverages from a point outside this State.

(d) Any person bringing alcoholic beverages into this State from without this State which are not consigned to any person and which are for delivery or use within this State.

A person licensed as a customs broker who is acting as an agent for a licensed importer or for another person whose place of business is without the State shall not be deemed to be the importer of alcoholic beverages consigned in United States internal revenue bond or in United States customs bond to the licensed customs broker.

23018. "Exporter." "Exporter" means any person who sells, delivers, or consigns alcoholic beverages lo-

cated within this State for delivery, use, or sale without the State.

23025. "Sell" or "sale." "Sell" or "sale" and "to sell" includes any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another, and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase of such beverages and soliciting or receiving an order for such beverages, but does not include the return of alcoholic beverages by a licensee to the licensee from whom such beverages were purchased.

23040. "Within this State." "Within this State" means all territory within the boundaries of this State.

23041. "Without the State." "Without the State" means all territory without the boundaries of this State.

23100. Continuous transit through State. Alcoholic beverages in continuous transit through this State are exempt from the provisions of this division only while in continuous transit through this State in the possession or custody of common carriers. The department may require affidavits of any person on forms prescribed by the department and may require any such shipments to be checked in and checked out at the boundaries of the State. Any person refusing to make the affidavits required or refusing to check in or check out the alcoholic beverages is guilty of a misdemeanor.

23300. When license required. No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.

23301. Criminal punishment. Any person violating Section 23300 is guilty of a misdemeanor, except that any person, without having a still license, exercising the privileges or performing any act which a still licensee may exercise or perform is guilty of a felony.

23374. Importer. Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license, to export the alcoholic beverages, and to transfer the beverages to himself under another license.

23374.5. Distilled spirits importer's general license. A distilled spirits importer's general license authorizes the person to whom issued to become an importer of distilled spirits and to sell distilled spirits to distilled spirits manufacturers, distilled spirits manufacturer's agents, distilled spirits wholesalers, rectifiers and distilled spirits general importers.

23376. Customs broker. A customs broker's license authorizes the transfer to licensed importers of alcoholic beverages brought into the State in United States internal revenue bond or in United States customs bond and the exportation of the alcoholic beverages. The holder of a customs broker's license may receive delivery of, possess, export, and transfer to licensed importers such alcoholic beverages as are brought into this State in United States internal revenue bond or customs bond. Such a license also authorizes the possession and exportation of alcoholic beverages acquired from licensed manufacturers or wine growers for export.

23378. Wholesaler. Any wholesaler's license authorizes the sale of the alcoholic beverage specified in

the license only to persons holding licenses issued by the department authorizing the sale of the alcoholic beverage, and authorizes the exportation of the alcoholic beverage.

23387. Delivery for use outside State. In addition to the other privileges exercised under a wholesaler's or rectifier's license, a wholesaler or rectifier may sell the alcoholic beverages mentioned in his license to persons who take delivery of such alcoholic beverages within this State for delivery or use without the State within 90 days from the date of such sale in accordance with rules and regulations prescribed by the department.

23661. Manner of consignment. Except as otherwise provided in this section, alcoholic beverages may be brought into this State from without this State for delivery or use within the State only by common carriers and only when the alcoholic beverages are consigned to a licensed importer, and only when consigned to the premises of the licensed importer or to a licensed importer or customs broker at the premises of a public warehouse licensed under this division.

The provisions of this chapter are not applicable in the case of alcoholic beverages which are sold and delivered by a licensee in this State to another licensee in this State, and which in the course of delivery are taken without this State through another state without any storage thereof in such other state.

The provisions of this section are not applicable in the case of alcoholic beverages brought into this State by an adult on board a steamship, common carrier, or air common carrier from without the United States for personal or household use which are exempt from pay-

ment of duty in accordance with the existing provisions of federal law. Such alcoholic beverages shall be exempt from state licensing restrictions.

The provisions of this section are not applicable in the case of alcoholic beverages shipped into this State from without the United States by an adult member of the Armed Forces of the United States, serving outside the confines of the United States, for his personal or household use within the State in such quantity of alcoholic beverages as is exempt from the payment of duty under existing provisions of the Federal Tariff Act or regulations. Such alcoholic beverages may be brought into this State only by common carrier and consigned to the premises of a licensed importer or customs broker, or to a licensed importer or customs broker at the premises of a public warehouse licensed under this division. Notwithstanding any other provisions of this division, the holder of an importer's license, a customs broker's license, or a public warehouse license, may make delivery of such alcoholic beverages as may be brought into this State under the provisions of this paragraph directly to the owner thereof upon satisfactory proof of identity. Such delivery shall not be deemed to constitute a sale in this State.

23663. Presumption for delivery in State. Alcoholic beverages which are consigned to a destination within this State shall be presumed to be for delivery or use within this State.

23775. Importer. An importer's license shall be issued only to a person or manufacturer who holds a license authorizing the sale for resale of the types of alcoholic beverages mentioned in the importer's license.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 919

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL FOR THE STATE OF CALIFORNIA, MALCOLM HARRIS, Director for the State of California, ARTHUR F. BROWN, District Supervisor, Southern District of the Department of Alcoholic Beverage Control, JAMES D. KELLER, District Attorney for San Diego County, California, and JAMES E. MARABLE, District Attorney for Imperial County, California,

Appellants,

v.

AMMEX WAREHOUSE COMPANY OF SAN YSIDRO, INC. and AMMEX WAREHOUSE COMPANY, INC.,

Appellees.

MOTION TO AFFIRM

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In The

Supreme Court of the United States

October Term, 1963

No. 919

Department of Alcoholic Beverage Control for the State of California, Malcolm Harris, Director for the State of California, Arthur F. Brown, District Supervisor, Southern District of the Department of Alcoholic Beverage Control, James D. Keller, District Attorney for San Diego County, California, and James E. Marable, District Attorney for Imperial County, California,

Appellants,

v.

Ammex Warehouse Company of San Ysidro, Inc. and Ammex Warehouse Company, Inc.,

Appellees.

MOTION TO AFFIRM

This is a motion to affirm filed primarily to assist the Court in its determination as to whether briefs should be considered and oral argument heard before affirming the case. There is presently pending for decision No. 1077, *Donald S. Hostetter et al.* v. *Idlewild Bon Voyage Liquor Corporation*, and this Court's decision on the basic issues in such case will be determinative of the basic issues in this case. Hence affirmance in this case can probably follow from the decision in *Idlewild*. However, Appellees desire to make it clear that in this case, under Appellees' method of doing business, there is clearly no room for holding that the State of California has any right of regulation, be it reasonable

or otherwise, State police power being pre-empted by paramount federal laws. Unlike *Idlewild*, Appellees do business only out of private customs bonded warehouses (under customs lock) where full-time U. S. Customs officers are stationed (their salaries being reimbursed the U. S. by Appellees) and all withdrawals for exportation (which are the only withdrawals made) are made through such officers. Furthermore, actual exportation is effected by Appellees through delivery under bond to the Customs export control officer at the Mexican border. While these facts eliminate any real or imagined "possibility of diversion" for delivery or use within the State and to some extent make it more clear in this case that there is no area for State regulation, it should be made clear that the Idlewild Bon Voyage Corporation is likewise doing its business as directed by U. S. Bureau of Customs. The fact that U. S. Customs may, for reasons sufficient unto itself, waive as to Idlewild Bon Voyage Corporation some of the stringent requirements it imposes on Appellees, does not open the door to State regulation in Idlewild. This point was not made to Appellees' satisfaction on oral argument or by brief in the *Idlewild* case. Should there be any question about this, then Appellees join Appellants in inviting briefs and oral argument in this case, but if there be no question as to the correctness of Appellees' position, then this case should be affirmed on this motion.

A great many sections of the Tariff Act and regulations, together with corollary Internal Revenue provisions and regulations, are to be involved in any consideration of this case upon brief or argument, but Appellees pray the Court's indulgence in not placing complete copies of same in an appendix to this motion, and instead appending only selected statutes with which the Court may be concerned on this motion. Suffice it to say that there is no question but that Appellees' businesses are done pursuant to such referred

to but unquoted statutes and regulations, as is apparent from the fact the U. S. Bureau of Customs supervises the entire operation.

Upon the foregoing statement, Appellees now move this Honorable Court to affirm the judgment of the three-judge court (but not the opinion insofar as it states there is a right of reasonable regulation), and in support of this motion, would show:

I. STATUTES AND REGULATIONS INVOLVED

Appellants have stated all of the Constitutional provisions involved in this case, but have not stated all of the statutes and regulations involved. Appellees assert their right to conduct their businesses pursuant to the following statutes and regulations, only selected portions of which are set out in full in Appendix "A".

(1) Tariff Act of 1930, as amended, 46 Stat. 763, particularly §§ 308, 311, 553, 554, 555, 556, 557, 558, 564, 565, 585, 586, 592, 594, 595, 623 and 646, being 19, U.S.C., §§ 1308, 1311, 1553, 1554, 1555, 1556, 1557, 1558, 1564, 1565, 1585, 1586, 1592, 1594, 1595, 1623 and 1646.

(2) Internal Revenue Code of 1954, as amended, §§ 5232, 5242, 5243, 5247.

(3) Federal Alcohol Administration Act of 1935, as amended, 49 Stat. 977 (1935), §§ 3 and 4, being 27, U.S.C., § 203 and § 204. (See Appendix "A".)

(4) Racketeering Act of 1948, as amended, in 1961, by the addition of § 1a, 75 Stat. 498, being 18, U.S.C., § 1952. (See Appendix "A".)

(5) United States Customs Regulations, 19 C.F.R., Parts 4, 8, 12, (particularly 12.37), 18, (particularly 18.1, 18.2, 18.3, 18.5, 18.10, 18.16 through 18.24), 19 (particularly Parts 19.1 through 19.15), 21, 23 and 25.

(6) Alcoholic Beverage Control Act of California, §§ 23019, 23300, 23355, 23374, 23376, 23377, 23378, 23379, 23394, 23402, 23667, 23775, 23777, 23778, 23779. (These statutes, on their face, prohibit Appellees from conducting their proposed businesses). (See Appendix "A".)

II. STATEMENT OF THE CASE

The District Court's findings of fact (Appendix "B" of Appellants' Jurisdictional Statement) more accurately state the proposed operations of Appellees than does Appellants' statement of the case. The Court's findings cannot be improved upon.

III. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD AFFIRM THE DISTRICT COURT

A. Jurisdiction of the Three-Judge Court Was Established Under 28, U.S.C., Section 1331 and Section 1337.

This case is clearly a case which arose under an Act of Congress regulating and protecting commerce, namely, the Tariff Act of 1930, as amended, by reason of which the District Court had jurisdiction pursuant to 28 U.S.C., § 1337, without regard for the amount in controversy. *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936). See also *Crispin v. Lykes Brothers S. S. Co.*, 134 F. Supp. 704 (D. C. Tex. 1955). The right of Appellees to carry on their proposed business which is authorized and controlled by the Constitutional provisions, statutes and regulations listed in Appellants' jurisdictional statement and in this motion, depends upon whether, in connection with the operation of such business, there is power of prohibition or regulation in the State of California under the 21st Amendment to the U. S. Constitution, or under any police power to reasonably reg-

ulate foreign commerce in a field occupied by Federal law. This involves the meaning of the 21st Amendment itself.

In addition to jurisdiction being conferred by 28, U.S.C., § 1337, jurisdiction is also established under 28, U.S.C., § 1331. On its face (without any necessity for construction), the Alcoholic Beverage Control Act of California *prohibits* Appellees from engaging in their lawful export business in the manner proposed. Moreover, counsel for Appellants stated that to be the case in open court. (See "The State Licensing Provisions" of the District Court's opinion in Appendix "A" of Appellants' brief). This court has stated in *Gibbs* v. *Bucks*, 307 U.S. 66, 59 S. Ct. 725 83 L.Ed. 1111 (1939), that "the issue on jurisdiction is the value of the right to conduct the business free of the prohibition . . ." and the Three-Judge District Court herein found the value of the businesses to exceed $10,000.00 each.

B. The Prior Decisions of This Court Are Controlling and So Clearly Support the Decision of the Court Below That This Court Should Affirm.

The position of Appellees upon the merits of this case is briefly stated in the following two paragraphs:

1. **The Federal Government, under its superior right, has completely legislated in the field in which action has been unconstitutionally attempted by the State of California.** Appellees hold a permit under the Federal Alcohol Administration Act (see Appendix "A") which authorizes them to engage in the business which they are conducting so long as they do not, in doing so, violate any State law (provided, of course, that such law be constitutional). Furthermore, Appellees only engage in the business of importing liquor for exportation from the United States, a business for which Congress, under the Tariff Act, has provided an elaborate bonding, warehousing and supervisory procedure in order to make possible the carrying out by private citizens of a desired Federal policy relative to tax and duty-

free exportations. The system of Federal law under which Appellees do business is so complete as to leave no area for State regulation, any such regulation, whether reasonable or not, being an invasion of a field pre-empted by Federal law and control. Should Appellees attempt to engage in any other business than what they are doing, then, unless there was compliance with State law, Appellees would be bootleggers subject to having all Federal permits cancelled and prosecution under the Racketeering statute, plus prosecution for possible customs violations. This would not deprive the State of its right to prosecute Appellees as law violators. Appellees say that in this case, since Congress under the Commerce Clause, as strengthened by the Export-Import Clause, has legislated in the field in question under a paramount right to do so (the 21st Amendment not being involved), the Federal law is supreme and the California statute cannot be constitutionally applied.

2. **Appellees' businesses do not come within the 21st Amendment, hence California cannot uphold its statute under the 21st Amendment.** Since no liquor is imported or transported into the State of California by Appellees for "delivery or use" therein (only for exportation into the Republic of Mexico), the 21st Amendment does not give the State of California the power to prohibit (or regulate), the commerce. Congressional power under the Commerce and Export-Import Clauses is ordinarily subject only to the possible exercise of police power of the State by means of reasonable regulation, except when, as is the case here, such police power is abrogated by reason of the fact that Congress has covered the field by complete legislation, and under the Supremacy Clause, any attempted State action is unconstitutional. Furthermore, Congress did not, by the Wilson or Webb-Kenyon Acts, negate any of the powers under which it has legislated and controls Appellees'

businesses. A combination historical and categorical analysis of the decisions by this Court and the laws make clear the conclusions expressed.

Prior to the 18th Amendment, the regulation or suppression of liquor traffic was a matter of local concern, except insofar as the authority of the states was circumscribed by the Commerce Clause. *License Cases*, 5 How. 504, 12 L. Ed. 256 (1847); *Bowman* v. *Chicago N. W. Ry. Co.*, 125 U.S. 465, 8 S. Ct. 689, 29 L. Ed. 502 (1888); and *Leisy* v. *Hardin*, 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890), where the Court said:

> "The responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with the imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

Congress, taking its cue from such cases, to remedy the difficulties experienced by the states in attempting to enforce local liquor laws, in 1890, passed the Wilson Act. Thereafter, this Court, in *Rhodes* v. *Iowa*, 170 U.S. 412, 18 S. Ct. 664, 42 L. Ed. 1088 (1898), construed the Wilson Act to mean that the state liquor laws would not operate against a consignee who received the liquor in interstate commerce for his own use. Accordingly, to remedy that situation, Congress, in 1913, passed the Webb-Kenyon Act. In *Adams Express Co.* v. *Kentucky*, 238 U.S. 190, 35 S. Ct. 824, 59 L. Ed. 1267 (1915), this Court held that *Webb-Kenyon* did not abrogate congressional power over interstate shipments (and more certainly it could not be so construed insofar as foreign commerce is concerned), saying:

> ". . . Except as affected by the Wilson act, which permits the state laws to operate upon liquors after

termination of the transportation to the consignee, and the Webb-Kenyon act, which prohibits the transportation of liquor into the state, to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

Incidentally, at this point, it should be demonstrated that this Court held, prior to the 21st Amendment, that by use of the word "into" in federal statutes dealing with liquor, Congress was in effect using a word of art to define the area of permissible application of State laws to liquor which entered a State to directly or perhaps indirectly become a part of the mass of goods of that State, and referred to the State of final destination rather than intermediary States through which it might, of necessity, pass to reach its destination. In *United States* v. *Gudger*, 249 U.S. 373, 39 S. Ct. 323, 63 L. Ed. 653 (1919), this Court held:

". . . We are of the opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any state or territory the laws of which state or territory prohibit the manufacture, etc.,' includes the movement in interstate commerce through such a state to another. No elucidation of the text is needed to add cogency to this plain meaning, which would, however, be reinforced by the context if there were need to resort to it, since the context makes clear that the word 'into' as used in the statute, refers to the state of destination, and not to the means by which that end is reached, the movement through one state as a mere incident of transportation to the state into which it is shipped."

That the 21st Amendment, when it was subsequently adopted, and Webb-Kenyon, when re-enacted following the 21st Amendment, were framed with a like intent in the use of

such word cannot now be argued in view of such holdings by this Court as in *Carter* v. *Virginia*, 321 U.S. 131, 64 S. Ct. 464, 88 L. Ed. 605 (1944), and *Collins* v. *Yosemite*, 304 U.S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502 (1938).

From the foregoing, it is apparent that the *Wilson* and *Webb-Kenyon Acts* were not made necessary by the 21st Amendment, but were originally enacted prior thereto so as to make as clear as possible the area in which Congress, notwithstanding its paramount powers under the Commerce Clause, desired that State action over liquor be upheld. As such cases make clear, however, Congress did not abdicate all of the powers possessed by it over interstate and foreign commerce in liquor.

Then followed prohibition and complete Federal control. Finally came the 21st Amendment which accomplished basically what Congress had prior to prohibition done by the *Wilson* and *Webb-Kenyon Acts*. That Congress so construed the amendment (i.e., that it still had power to legislate in the field) is evident by its prompt passage of the *Federal Acohol Administration Act*, August 29, 1935, 49 Stat. 977, 27 U.S.C. Section 201 et seq. The purpose of the Act, as stated in Sec. 3, was "effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the 21st Amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine and malt beverages."

Having brought the argument to the point of the enactment of the 21st Amendment, Appellees would not only demonstrate that the 21st Amendment does not provide any constitutional sanction for State control but also that this case transcends the scope of any cases previously decided (unless *Idlewild* be decided in the interim of this brief),

which cases generally have fallen into the following categories:

a. Those cases in which the 21st Amendment is directly involved because liquor is being imported or transported into a State for delivery or use therein. Where this is involved, the State may go so far as to prohibit, this being the intent of the 21st Amendment. In this category are such cases as *State Board of Equalization* v. *Young's Market*, 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38 (1936), (one of the earliest cases decided after the Amendment); *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 84 L. Ed. 128, 60 S. Ct. 163 (1939) and *Joseph Finch & Co.* v. *McKittrick*, 305 U.S. 395, 59 S. Ct. 256, 83 L. Ed. 246 (1939). Importation for delivery or use in California is not involved in this case. All liquor is in the stream of foreign commerce for exportation into the Republic of Mexico.

b. Those cases in which liquor is simply being transported through a state on an interstate journey and reasonable regulation under the States' police power (not the 21st Amendment) is permitted to insure no diversion, the test of reasonableness being measured by the extent to which normal interstate commerce in liquor is burdened. In this category are the cases of *Carter* v. *Virginia*, 321 U.S. 131, 64 S. Ct. 464, 88 L. Ed. 605, (1944); and *Duckworth* v. *Arkansas*, 314 U.S. 390, 62 S. Ct. 311 86 L. Ed. 294 (1941); and *Gordon* v. *Texas*, 355 U.S. 369, 78 S. Ct. 363, 2 L. Ed. 2d 352 (1958). While these cases demonstrate that the 21st Amendment cannot be used by a state to support laws of imposing burdens on the through transportation of liquor (which almost goes without saying), they do not settle the issue here because none of them involved "through" transportation in foreign commerce under Federal supervision pursuant to comprehensive Federal laws, and it is maintained in this Brief that this removes the possibility of state

regulation. For example, in *Duckworth*, the Supreme Court states: "The Arkansas Statute does not conflict with any act of Congress." In other words, though in *Duckworth* the regulation was approved as reasonable, the Court made it clear no out and out conflict with a paramount Federal statute was involved as is the case here. Here the California permit system does conflict with the Federal laws, as would any type of "permit" regulation.

c. The group of cases where this Court and other Federal Courts have held that though the liquor came within the 21st Amendment, Federal statutes (such as Anti-Trust Laws) could also be enforced. These cases do not involve the supremacy of Federal law, only the power of Congress under the Commerce Clause versus the power of the State under the 21st Amendment. Cases in this category are such cases as: *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 65 S. Ct. 661 89 L. Ed. 95 (1945) (Sherman Act); *Hanf* v. *United States*, 235 F. 2d 710 (8th Cir. 1956) (27 U.S.C. Sec. 203); and *Jatros* v. *Bowles*, 143 F. 2d 453 (6th Cir. 1944) (Price Control). State law under the 21st Amendment cannot render inapplicable Federal laws.

d. A group of cases where supremacy of Federal jurisdiction is held to prevent State action notwithstanding the 21st Amendment. These are the cases of *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 64 S. Ct. 622, 88 L. Ed. 814 (1944); and *Collins* v. *Yosemite Park and Curry Co.*, 304 U.S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502 (1938), involving Federal reservations located within the boundaries of a State, and hold that the State cannot require permits of those selling liquor or transporting it into the Federal reservations. These cases do demonstrate the supremacy of the Federal law over the power of States under the 21st Amendment and that the Amendment doesn't apply to "through" transportation, but factually are not on all fours

only because no Federal reservation is involved in this case. The analogy, however, is strong since the liquor here is at all times, under direct custody and control of U. S. Customs officers.

As stated at the outset, this case transcends the scope of previous cases. The decision by this Court will not affect California's administration of its liquor laws to any situation other than to Appellees. Its effect will simply be to hold that California cannot engraft on to this fully and completely regulated Federal business in foreign commerce (and Federal regulation is not only to protect Federal revenue but also State interests under the 21st Amendment), California's permit and price control system — the California system being one which dictates who may have permits, who such permittees must buy from (only other permittees of a designated class), who such permittees must sell to and the prices to be charged, how transportation and storage will be handled (including inspection rights in contravention of Federal dominion), how records will be kept, etc., and, in this instance, provides no permit for Appellees which prevents Appellees from carrying on their lawful business. Such a law, while protecting obvious State interests insofar as liquor for "delivery or use" in California is concerned, serves no police or other legitimate purpose in the case of Appellees' business. Since it interferes with Federal officers and overlaps their function, it would have to be justified on some ridiculous basis such as a lack of trust in Federal officers enforcing Federal laws designed to keep liquor from becoming a part of the mass of goods in California prior to being exported. This basis cannot support any such asserted policy power because the Courts of California have recognized that, insofar as liquor is concerned, the effective purpose and result of the "in-bond" procedure under the Tariff Act is to keep the liquor from

becoming a part of the mass of goods within the State of California. *National Distillers Products Corp.* v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61 (1956), and hence provides no basis for State action. In other words, the "in-bond" procedure not only clearly removes the case from the 21st Amendment, but it, together with the Federal permit system, eliminates State police power. If *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, 60 S. Ct. 664, 84 L. Ed. 840 (1940), involved liquor instead of oil, there would not be even the slightest room for argument and indeed there should be none. Surely this Court could decide no differently on this question than did the California Court and the New York Court in *During* v. *Valente*, 267 App. Div. 383, 46 N.Y.S. 2d 385 (1944), when it held the New York Alcoholic Beverage Control Law inapplicable in the New York free-trade zone. The New York Court met head-on the asserted distinction between oil in *McGoldrick* and whiskey, and held it made no difference, stating what Appellees assert to be the obvious conclusion, that:

> " 'The regulatory powers of the State Liquor Authority (do not) extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York,' 108 N.Y.S. 2d at 9."

This Court, in applying U. S. Constitutional principles dependent upon whether or not a commodity is in the stream of foreign commerce is involved, has usually not had a situation where Federal officers see to it that once the commodity is placed in the stream, it cannot leave. The more typical situation is where the Court has had to recognize that intent alone is sufficient to determine the character of a shipment and temporary stoppages or breaks in transit do not remove it from the stream so long as the carrying out of the original intent remains the purpose of the parties

involved. For example, see *T & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U.S. 111, 33 S. Ct. 229, 57 L. Ed. 442 (1913), wherein it is held that it is "the nature of the traffic, and not its accidents, which determines its character (as interstate, foreign, or intrastate commerce) . . ." There, because the lumber designed for export was shipped via railroad from the Texas mills to a Texas seaboard wharf on one bill of lading and stored on the wharf until a ship became available for transportation to a foreign country, the contention was made that intrastate rates, under Texas Railroad Commission rules, applied rather than rates prescribed for foreign commerce by the Interstate Commerce Commission. The "accidents" of the journey referred to were the bill of lading and temporary stoppage and storage. The Court held the journey to be governed by Interstate Commerce Commission rules and rates because its character was fixed by the intent of the shipper to export which existed from the moment of shipment. This same result followed in the case of *Santa Cruz Fruit Packing Co.* v. *N. L. R. R.*, 303 U.S. 453, 58 S. Ct. 656, 82 L. Ed. 954 (1938), where there was temporary storage. Surely the intent of Ammex alone (which is made clear from every document it files and every step it takes) without the bonds and supervision suffices to put this liquor in the stream of foreign commerce. Temporary storage in California and delivery to Customs at the export lot for transfer to the Mexican importer do not change this character. If, however, intent was all the Court had to deal with, then it might be argued that since liquor is involved, regulation ought to be permissible, if reasonable, as in *Carter*, *Duckworth* and *Gordon*, where the Court could suspect that a mere "change of mind" might put the liquor into use in the States in question. In this case, a change of mind is not possible. This is so because the "in bond" procedure, by putting the liquor under Federal supervision, effectively

removes it from Appellees' control and use. Federal officers see to it there is no change in mind. Since Appellees only use a basic importer's permit, Federal officers could not permit withdrawal without being shown Appellees possess proper State permits for liquor to be delivered or used within the State. Thus this Court is not reviewing a situation where protection for the State of California depends upon Appellees' honesty as in *Carter*, *Duckworth* and *Gordon*, and, by the same token, there is no permissible area of State regulation.

To attempt to superimpose State regulation on complete Federal control is certainly violative of the Federal supremacy principle *Hines* v. *Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941) and also is contrary to this Court's holding in *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 53 S. Ct. 509, 77 L. Ed. 1025 (1933), as to the exclusive and plenary powers of Congress over foreign commerce. In such case, this Court pointed out that:

> "The Tariff Act of 1922 is entitled, 'An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.' The Congress thus asserted that it was exercising its constitutional authority 'to regulate Commerce with foreign Nations.' Article 1, Sec. 8, cl. 3. The words of the Constitution 'comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.' Gibbons v. Ogden, 9 Wheat. 1, 193, 6 L. Ed. 23. It is an essential attribute of the power that it is exclusive and plenary. *As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action.* Id., pages 196-200 of 9 Wheat., 6 L. Ed. 23; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. Ed. 678; Almy v.

California, 24 How. 169, 173, 16 L. Ed. 644; Buttfield v. Stranahan, 192 U.S. 470, 492, 493, 24 S. Ct. 349, 48 L. Ed. 525. The power is buttressed by the express provisions of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Article 1, Sec. 10, cl. 2.

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". . . In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the state as none exists with respect to the subject over which the federal power has been exerted" . . .

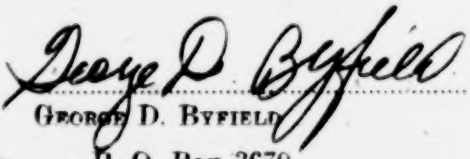
Clearly, the Court is dealing here in an area where Congress has exclusive and plenary powers, which powers it has exercised and has done so with the States in mind. By use of the permit system as well as the bond procedure, the Federal Government protects the States against diversions from foreign commerce in violation of State laws under the 21st Amendment. California's laws are not being flaunted, but will be upheld in the area where they can operate. To the extent that such laws have transgressed their proper area, it was proper to grant the injunction as the Court below did.

IV. CONCLUSION

Because Appellees' liquor, which is for exportation only, is in the constant stream of foreign commerce, passing through the State of California under constant control, possession and supervision of the Federal Government, and because it does not become a part of the mass of goods of the State of California, the 21st Amendment does not

confer upon the State any right of control. Under the authorities, the only right of control which could be left to the State of California would arise under the police power of the State and only then in the absence of supervening Congressional action could California burden interstate commerce. Since Congress has completely pre-empted the field insofar as importations and exportations of intoxicating liquors in foreign commerce are concerned, there is no room for any type of State control whatsoever over Appellees' lawfully sanctioned export business and the judgment below should be affirmed.

Respectfully submitted,



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CERTIFICATE

I, George D. Byfield, do hereby certify that four copies of the foregoing brief and motion to affirm were mailed by me on this the 10 day of April, 1964, to the attorneys for appellant at 600 State Building, Los Angeles 12, California (in an envelope properly addressed and with the required postage for regular United States Mail), as follows:

Stanley Mosk, Attorney General of the State of California;

E. G. Funke, Assistant Attorney General
Felice R. Cutter, Deputy Attorney General
Warren H. Deering, Deputy Attorney General

George D. Byfield

George D. Byfield

APPENDIX "A"

27 U.S.C. § 203: **Unlawful businesses without permit; application to state agency**

In order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages:

(a) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury —

(1) to engage in the business of importing into the United States distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported.

(b) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury —

(1) to engage in the business of distilling distilled spirits, producing wine, rectifying or blending distilled spirits or wine, or bottling, or warehousing and bottling, distilled spirits; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits or wine so distilled, produced, rectified, blended, or bottled, or warehoused and bottled.

(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury —

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased.

This subsection shall take effect July 1, 1936.

This section shall not apply to any agency of a State or political subdivision thereof or any officer or employee of any such agency, and no such agency or officer or employee shall be required to obtain a basic permit under this chapter.

27 U.S.C. § 204: **Permits**

(a) **Who entitled thereto**. The following persons shall, on application therefor, be entitled to a basic permit:

(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) **Refusal of permit; hearing.** If upon examination of any application for a basic permit the Secretary of the Treasury has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Secretary of the Treasury, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

(c) **Form of application.** The Secretary of the Treasury shall prescribe the manner and form of all applications for basic permits (including the facts to be set forth therein) and the form of all basic permits, and shall specify in any basic permit the authority conferred by the permit and the conditions thereof in accordance with the provisions of this chapter. To the extent deemed necessary by the Secretary of the Treasury for the efficient administration of this chapter, separate applications and permits shall be required by the Secretary of the Treasury with respect to distilled spirits, wine, and malt beverages, and the various classes thereof, and with respect to the various classes of persons entitled to permits hereunder. The issuance of a basic permit under this chapter shall not operate to deprive the United States of its remedy for any violation of law.

(d) **Conditions.** A basic permit shall be conditioned upon compliance with the requirements of section 205 of this title (relating to unfair competition and unlawful practices) and of section 206 of this title (relating to bulk sales and bottling), with the twenty-first amendment and laws relating to the enforcement thereof, and with all other Federal laws relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto.

(e) **Revocation, suspension and annulment.** A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Secretary of the Treasury deems appropriate, if the Secretary finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Secretary finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

(f) **Service of orders.** Orders of the Secretary with respect to any denial of application, suspension, revocation, annulment, or other proceedings, shall be served (1) in person by any officer or employee of the Secretary designated by him or any internal revenue or customs officer authorized by the Secretary for the purpose, or (2) by mailing the order by registered mail, addressed to the applicant or respondent at his last known address in the records of the Secretary.

(g) **Duration.** A basic permit shall continue in effect until suspended, revoked, or annulled as provided herein, or voluntarily surrendered; except that (1) if leased, sold or otherwise voluntarily transferred, the permit shall be automatically terminated thereupon, and (2) if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock-ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided*, That if

within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Secretary of the Treasury.

(h) **Appeal; procedure.** An appeal may be taken by the permittee or applicant for a permit from any order of the Secretary of the Treasury denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him for that purpose, and thereupon the Secretary shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence

to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28. The commencement of proceedings under this subsection shall, unless specifically ordered by the court to the contrary, operate as a stay of the Secretary's order.

(i) **Limitation**. No proceeding for the suspension or revocation of a basic permit for violation of any condition thereof relating to compliance with Federal law shall be instituted by the Secretary more than eighteen months after conviction of the violation of Federal law, or, if no conviction has been had, more than three years after the violation occurred, and no basic permit shall be suspended or revoked for a violation of any such condition thereof if the alleged violation of Federal law has been compromised by any officer of the Government authorized to compromise such violation.

18 U.S.C. § 1952. **Interstate and foreign travel or transportation in aid of racketeering enterprises**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraph (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

California Alcoholic Beverage Control Act, Business and Professions Code

23019. **"Customs broker."** "Customs broker" means every person who is authorized to act as agent or broker for a person licensed as an importer or for a person whose place of business is without the State, in regard to the importing of alcoholic beverages into the State in United States internal revenue bond or in United States customs bond.

23300. **When license required.** No person shall exercise the privilege or perform any act which a licensee may

exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.

23355. **License privileges; deliveries.** Except as otherwise provided in this division and subject to the provisions of Section 22 of Article XX of the Constitution, the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others at the premises for which issued during the year for which issued. Deliveries of distilled spirits by a licensee to another licensee may be made from the vendor's licensed premises or from a warehouse located within the county in which the vendor's licensed premises are located except as permitted by Section 23383. Deliveries to a licensed importer may also be made from any point outside the State.

23374. **Importer.** Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license, to export the alcoholic beverages, and to transfer the beverages to himself under another license.

23376. **Customs broker.** A customs broker's license authorizes the transfer to licensed importers of alcoholic beverages brought into the State in United States internal revenue bond or in United States customs bond and the exportation of the alcoholic beverages. The holder of a customs broker's license may receive delivery of, possess, export, and transfer to licensed importers such alcoholic beverages as are brought into this State in United States internal revenue bond or customs bond. Such a license also authorizes the possession and exportation of alcoholic beverages acquired from licensed manufacturers or wine growers for export.

23377. **Wine broker.** A wine broker's license authorizes the person to whom issued to act as a wine broker, for a fee or commission, in the purchase of wine for or on behalf of a person within or without this State authorized to buy wine for purposes of resale and in the sale of wine for on behalf of a person, other than a retail licensee, licensed to sell wine within the State. A wine broker shall not buy or sell any wine for his own account, take or deliver title to wine, or receive or store any wine in his own name in this State. A wine broker shall not offer to sell, agree to offer to sell, or sell any wine unless he first has a bona fide authorization to do so from a person, other than a retail licensee, licensed to sell wine in this State. A wine broker shall not offer to buy, agree to buy, agree to offer to buy, or buy any wine unless he first has a bona fide authorization to do so from a person within or without this State authorized to buy wine for purposes of resale. The exercise of the privileges granted by the wine broker's license are subject to such rules and conditions as the department deems necessary and proper.

23378. **Wholesaler.** Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the department authorizing the sale of the alcoholic beverage, and authorizes the exportation of the alcoholic beverage.

23379. **Beer and wine wholesaler.** A beer and wine wholesaler's license also authorizes the labeling, bottling, or packaging of wine in accordance with and subject to the rules of the State Department of Public Health. A beer and wine wholesaler's license shall not permit the sale or delivery of wine to consumers in containers supplied, furnished, or sold by the consumer.

23394. **Off-sale general privileges.** An off-sale general license includes the privileges specified in Section 23393

and authorizes the sale, to consumers only and not for resale, of distilled spirits in packages of not more than one gallon and in packages containing not less than one-half pint, for consumption off the premises where sold.

23402. **Purchase by retail licensees.** No retail on- or off-sale licensee shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license.

23667. **Importer's receipt to carrier.** Common carriers transporting alcoholic beverages into this State for delivery or use within this State or common carriers making delivery of alcoholic beverages so transported shall obtain from the licensed importer or customs broker a receipt on a form prescribed by the department for the alcoholic beverages so transported and delivered. If the consignee refuses to give the receipt and show his license to the carrier, the carrier is relieved of all responsibility for delivery of the alcoholic beverages.

23775. **Importer.** An importer's license shall be issued only to a person or manufacturer who holds a license authorizing the sale for resale of the types of alcoholic beverages mentioned in the importer's license.

23776. **Wholesaler.** A wholesaler's license shall not be issued to any on-sale licensee.

23777. **Same; cities of 50,000.** No off-sale general license shall be renewed or issued to a distilled spirits wholesaler whose premises are located in a city having a population of 50,000 or more, as shown by the 1940 federal census, or to a distilled spirits wholesaler who sells distilled spirits to licensees whose premises are located in any city having a population of 50,000 or more, as shown by the 1940 federal census.

23778. **Same; stock of spirits.** A distilled spirits wholesaler's license shall not be held by any person unless at all times throughout the license year he has on his wholesale premises a reasonable stock of distilled spirits, as determined by the department, for which he has fully paid lawful money or its equivalent.

23779 **Same; good faith.** No wholesale license shall be issued to any person who does not in good faith actually carry on or intend to carry on a bona fide wholesale business by sale to retail licensees of the alcoholic beverage designated in the wholesale license, and the department may revoke any wholesale license when the licensee fails for a period of 45 days actively and in good faith to engage in the wholesale business and shall revoke any distilled spirits wholesaler's license held by any person who fails to comply with applicable provisions of Sections 23378, 23379, 23776, 23777, and 23778. Sale by a wholesale licensee to himself as a retail licensee is not the transaction of a bona fide wholesale business.